United States Court of Appeals
for the Second Circuit

JOINT APPENDIX

77-7102, 7114

United States Court of Appeals
FOR THE SECOND CIRCUIT

◆

Docket Nos. 77-7102 and 77-7114

NEW YORK ASSOCIATION OF HOMES FOR AGING, et al.,
Plaintiffs-Appellants,
against

PHILIP L. TOIA, as Commissioner of Social Services of the State of New York, et al.,
Defendants-Appellees.

UNITED STATES COURT OF APPEALS
FILED
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A. DANIEL FUSARO, CLERK
SECOND CIRCUIT

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JOSEPH BULLA, et al.,
Plaintiffs-Appellants,
against

PHILIP L. TOIA, as Commissioner of Social Services of the State of New York, et al.,
Defendants-Appellees.

B p/s

JOINT APPENDIX
VOLUME III: Pages 1316 to 1815

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UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

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NEW YORK ASSOCIATION OF HOMES
FOR AGING, INC., et al.,

Plaintiffs,

vs.

PHILIP TOIA, et al.,

Defendants.

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NATHAN KLUGER, et al.,

Plaintiffs,

76 Civ. 5113
76 Civ. 5233
76 Civ. 5320

vs.

PHILIP TOIA, et al.,

Defendants.

-----------------------------------x

NEW YORK STATE HEALTH FACILITIES
ASSN.,

Plaintiffs,

vs.

PHILIP TOIA, et al.,

Defendants.

-----------------------------------x

December 10, 1976

Appearances;

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THE COURT: Mr. Mantzoros.

MR. MANTZOROS: If it please the Court, may I make a suggestion, and I think it will save this Court's time and perfect a record?

My suggestion is this, sir:

We do have a further and more detailed analysis that's not in affidavit form and each of the five plaintiffs and what the status is.

We would like, and the only reason is because they have to go to Albany to type them and return them, as I understand.

Next Friday I will have five affidavits on each of the five plaintiffs as to the status of their compliance with the situation, any losses that they may have and the explanations they may have as to the losses they may have.

My suggestion is, I made it to counsel earlier before we started, they may have whatever time because they need time to reply to these affidavits that the department will give them as to each of the five plaintiffs.

It will save your Honor maybe three or four hours tonight to take testimony which may not be as perfect as it should be for that type of presentation.

I could get them down earlier but it is my problem up to Albany and delivering them down here again by messenger.

THE COURT: You are saying they would be down here next Friday?

MR. MANTZOROS: At the latest. If we can have them earlier, we'll do that. That would save three or four hours' time.

MR. STERN: Your Honor, it has now been almost a month since the action has been commenced.

THE COURT: Let's avoid all of that. There are lots of problems in this action and the plaintiffs have always seemed to take the view that this was something that you can just sort of fall over and quickly enter a preliminary injunction.

It is quite to the contrary. This takes a lot of work and it's going to take some patience and that's all there is to it, so nobody ought to get any ideas that this is something that can be done quickly or there's some facile solution. It just isn't that way.

Now, I do think, however, that I was told at our last hearing that the commissioner or assistant commissioner of the relevant department would be here and would be prepared to comment on these allegations of pending threatened insolvency and so forth, and I think we ought to proceed with that and it really is not acceptable to me to wait until next Friday.

I think you have to put on your proof today and we'll just go ahead and do it.

MR. MANTZOROS: Dr. Frank Cicero, the second deputy commissioner, is here, and also Mrs. Estelle Wall has returned again for any assistance she may be able to render to the Court.

May we do this, if your Honor please: Let's take the testimony or whatever offer of proof he will give you the details that afternoon.

THE COURT: Let's see what has to be done.

I don't know what has to be done.

MR. MANTZOROS: Dr. Cicero is here, Commissioner of the Department of Health, and Mrs. Wall is also here for any questions you may have.

THE COURT: Why don't you put Dr. Cicero on.

I would suggest you just have formal testimony although --

MR. MANTZOROS: Unless, like last time he can give the details of the analysis that they have, which is from notes, then we'll perfect it with the affidavits.

THE COURT: I certainly learned a lot last time, only maybe it was a little informal. Let's have the formal testimony.

FRANK T. CICERO, called as a witness on behalf of the State of New York, having been first duly sworn, testified as follows:

THE CLERK: State your name.

THE WITNESS: Dr. Frank T. Cicero.

THE COURT: All right, Mr. Mantzoros.

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EXAMINATION BY

MR. MANTZOROS:

Q Dr. Cicero, what is your position with the State of New York?

A I am the second deputy commission of the State Health Department.

Q Your offices are in Albany?

A Yes, they are.

Q Are you familiar with the pending action which is before this Court at this time, New York Association of Homes for Aging v. Toia, et al.?

A Yes, I am.

Q During this past week, have you made any analysis with respect to certain allegations that have been made in the complaint and in the affidavits in support of plaintiffs' motion for preliminary injunction?

A Yes, the commissioner was informed of this, I believe, on Tuesday of this week and he called in to the central office from the appropriate field survey office. Individuals from those offices who were familiar with the individual homes at issue, and they, in cominbation with the appropriate program backup staff in central office, worked yesterday and the day before yesterday, and through til about 2:00 or 3:00 o'clock yesterday afternoon in analyzing the cases.

Q You have that analysis in note form as to each of the five plaintiff nursing non-profit facilities that are plaintiffs in this action?

A Yes, I do.

Q Would you start with, let's say, St. Cabrini Nursing Home, Inc.

Would you state the summary and the details of the analysis that you have with respect to the allegations of this complaint and the motion for preliminary injunction?

A I might prefacer my remarks, your Honor, by noting that generally these five homes provided good nursing care to a general mix of patients that require nursing home care, and I say that in the sense that they belong in nursing homes by and large, which I also believe is a statement that is true for the industry as a whole.

In a general sense, St. Cabrini's nursing home is a 200-bed nursing home located in Dobbs Ferry and specifically our surveyors were assured that the facility was rendering acceptable care.

The one thing about St. Cabrini's in relation to the patients, is that they do not have -- not everyone, a large number -- not everyone, a medium number of heavy case patients, patients that require intensive type patient care.

MR. STERN: Your Honor, may I object to this form of testimony, unless Dr. Cicero states upon what he basis that statement, whether he personally has surveyed this or whether he has any basis other than a conversation in which he participated.

THE COURT: Loo, I think that this is inevitable.

He made it very clear that he was making statements based on reports but he has gathered these reports in the course of his duties and indeed this is the kind of information that I think I was hoping to get from the State and if it is inaccurate and the secondhand problem means it is inaccurate, that can be easily corrected, but this is partly testimony and partly a statement of the position of the State of New York's agencies in this regard.

But I think that we can't have endless numbers of witnesses. If he is wrong on something, just show me.

MR. STERN: If he says that --

THE COURT: Let's not have all this now.

MR. STERN: Even granting the need for certain informality, your Honor.

THE COURT: What is informal about somebody giving sworn testimony?

MR. STERN: If your Honor doesn't want me to detail it, I won't.

THE COURT: I think it is a waste of time.

Go ahead.

THE WITNESS: Your Honor, the rating system that we have in the State is mandated --

THE COURT: You said there wasn't even a medium number of --

THE WINTESS: They actually said patient mix average, no heavy case patients.

I did not want to go specifically that far, but that's what the actual -- my actual notes are.

I think the point here is that getting to the crux of this issue of St. Cabrini, that they received a good State rating in our rating system. Good State. And that means, your Honor, that this home meets all of the State code or meets the State code in sufficient details to be rated as a good State facility, and our State code is higher than, say, the federal code as applicable to nursing homes.

I say that, your Honor, because our review of this home showed that they could eliminate staff that would come out to $620,000 a year, that would affect the per diem rate over $9 a day and that within this context of this really massive cut, they would still retain, in our judgment, the good State rating. They would not fall by this cut.

THE COURT: All right.

Now, let me hear the reporter give me those figure again, they could eliminate what?

(Read back.)

THE WITNESS: Your Honor, I could go through the specific areas of cutting, but one of the areas for cutting that's most striking and I think go to the crux of the prudent buyer concept, your Honor, is their cost for nursing administration. That is, the type of personnel that administer the nursing care in that home.

Their current cost, they are achieving -- they are paying out cost of $145,000 a year.

THE COURT: For what?

THE WITNESS: For nursing administration. Not the laying on of hands, your Honor, and I want to make that differentiation clear here.

We say you can do it, administer that nursing department in that 200-bed nursing home at a cost of $41,000 for a savings of $104,000.

THE COURT: Let me just divert for a moment and we'll come back to this.

Let us take what you are saying as the position of the Department of Health and I am not completely clear on the relative roles of the Department of Health and social Services, but I am assuming that the Department of Health has a critical function.

THE WITNESS: We're the surveying and licensing agent.

THE COURT: Who is it that actually sets the individual rates, the defendant Whalen? That's the Department of Health; right?

THE WITNESS: Right, your Honor.

THE COURT: So your department is very crucial in this.

I wanted to ask you, has your department ever apprised the St. Cabrini Home of this position before today?

THE WITNESS: I think that is -- I was talking to the commissioner about an hour and a half ago on the telephone. That's a very critical issue, because it's a good point because it's apparent to me after reviewing these five cases, that there really has to be a change and --

THE COURT: I just want to ask you a question.

THE CWITNESS: Right.

THE COURT: Has the Department of Health or has anybody else representing the State of New York or whatever the federal government, or whatever agency might do it, have any of them before this afternoon on this witness stand apprised the St. Cabrini Home of this posiition or anything similar to it?

THE WITNESS: Not to the best of my knowledge, your Honor, because --

THE COURT: Okay. I just want to explore that with you and it's very difficult because despite all the massive papers, I don't feel still I have got a complete grasp of the procedures, but I will do the best I can.

What strikes me right off is that you take this position on the basis of reports that have been made to your office and yet, it almost goes without saying that if there were some kind of a discussion of any form or a hearing or whatever, St. Cabrini would probably come forward with their position and it might not be exactly the same.

THE WITNESS: I suspect it wouldn't be.

THE COURT: But in the course of a discussion or the assembling of the facts in whatever way, everybody undoubtedly would learn more than they know right now; right?

THE WITNESS: Yes, your Honor.

THE COURT: What I am sitting wrestlying with, it seems to me, that there are two elements in fixing these rates.

There is the necessity apparently to generalize. You can't just completely tailor-make rates for -- you don't tailor-make every element of every rate just for the homes. There are some general rules.

This averaging that we talked about and so forth --

THE WITNESS: Yes, there are some general rules.

THE COURT: But also in the course of this in the setting of the rates, there is a rate set for the individual home?

THE WITNESS: Yes, your Honor.

THE COURT: Okay.

Let's take St. Cabrini. St. Cabrini has come in saying that right now they are four months behind, or something like that, to their suppliers, and that they are losing money and that they believe that perhaps in two months they won't even be able to meet their payroll.

I am really going beyond just questioning you. I'm wondering if there could not be some procedure for having an exchange of views, an exchange of information between your office and the St. Cabrini Home on the points they raise and on the points you raise.

If you're right, then that is very important. If in fact you aren't right and could be persuaded, that would be very important, too.

THE WITNESS: Absolutely.

THE COURT: Isn't there a format that that could be done and I really question whether the sitting in the federal district court is the best format for doing it?

THE WITNESS: We're fully prepared to sit with the nursing home, your Honor, go over this.

THE COURT: Do you have the power?

Let me ask you this: Let us suppose that after an intelligent consideration in your office, let's suppose that you would odify your belief that you just told me. Now, would you have the power, would your office have the power, to recalculate the rate?

THE WITNESS: I think we have a rate appeal provision in there and the way that that would come about and I think the case mix question is a good example of that which counsel raised objection to the way I answered that.

If they came and showed us that without question they have a lot of heavy care cases regarding character changes and so forth and so on, intravenouses, that sort of thing, we understand that, your Honor, and that's why we put in and are very concerned about this patient mix question in this whole rating question in the setting of rates.

That's an eligible item for appeal and we clearly, if convinced, would be able to review our rate and recalculate it as appropriate.

I would just like your Honor to know that what we did with these five homes though, is insure that we didn't cut one item that would affect their rating, their rating.

These are cuts -- administrative cuts, those sort of things, that would not affect their rating. So I do not want to mislead you.

The issue with a place like St. Cabrini and in addition to everything else, happens to have $92,000 cash in the bank, is owed $34,000 from the sisters due to the home.

In addition to these things, these things we would have to take into consideration, I would not want to mislead you on that point, your Honor.

THE COURT: Oh, no, you're not at all.

What I'm getting at, I'm trying to speak now in a kind of non-technical way, that's why I phrase it in terms of exchange of ideas, because I don't want to try to get into the technicalities of appear procedure. So if we could just still keep it in a non-technical vein and my point is that putting aside the exact formalities of how it is done, I take it that your office would be willing to consider to do two things; One, to convey to the St. cabrini Home, not only what you have just outlined in general terms, but to give them all the detail, whatever you have worked out as in the way of your criticism or your suggestion, you would be willing to give them that, and lay it out as well as you could.

THE WITNESS: Absolutely.

THE COURT: Secondly--that's correct.

THE WITNESS: Absolutely.

THE COURT: Secondly, I take it that your department would be willing to consider any rebuttal or corroboration or anything that they would present; right?

THE WITNESS: Absolutely.

THE COURT: Okay. Here is what I find is a problem in this case. And I am speaking -- I am not trying to lay down rulings for the moment, but I am just trying to indicate my problems in dealing with the case, so I wish you would take it in that vein and nobody feel that they have won or lost according to what I am saying now.

I believe that the plaintiffs have indicated something in the way of a valid problem about the process here.

In other words, I have a very serious question as to whether the new rates that came into effect were accompanied by enough sensible notice and opportunity for discussion.

I could be wrong and that's still something I would have to go into and again I am trying to put it in a non-technical way.

I am not talking about hearings or any of that stuff.

THE WITNESS: I understand.

THE COURT: As far as the substance, as far as whether these rates in fact are legal or not, that's a terribly complex question. It involves mostly, it seems to me, questions of -- that really arise under the State law rather than under any federal law.

It of course does ultimately raise questions of federal law, but in any event, to reach a determination as to the merits of the particular formulas, whether this factor is a good factor or an arbitrary factor, that is just a long and difficult process.

As far as anything -- anything for me to understand, rule or do anything with that. But I am not sure that it is even of any utility for me to get into that at this point, because I really think that perhaps there ought to be a consideration of some procedures whereby the people who really know about it, grapple with it.

Okay, now, what I am leading up to is this:

I have got to get into the technical procedure.

You speak of appeal. Now, you are referring, I take it, to this. Tht if the St. Cabrini Home is given a notice of a new rate, they have a right to appear that rate; is that correct?

THE WITNESS: Yes, your Honor.

THE COURT: Okay.

Now, how long -- what do they do to appear? Who do they appeal to, and how long does it take to get the problems resolved?

THE WITNESS: They appeal, of course, to the department and there is a procedure that is set up for hearing of rate appeals.

The commissioner has established in the department a rate appeals board, which is myself, as the chairman or the second deputy -- now that I am the second deputy, but just to be specific --

THE COURT: You are the chairman of that board?

THE WITNESS: Rate appeals board in my role as the second deputy commissioner.

THE COURT: Okay. Go ahead.

THE WITNESS: The home puts in their information, it is analyzed and there is no question if the volume is large, either the volume in relation to an individual home or volume of appeals, it is time consuming.

Again I don't wish to mislead the Court.

THE COURT: But there is the rub, you see, if you have drastic reductions in rate imposed effective, say, November 1, 1976, and then you have a large volume of appeals and a lot of work to do on those appeals, then you have these reduced rates in effect while that process is going on.

Now, I think one could certainly say that in an inflationary period, that you might think about some other procedure and that would be to keep the existing rates in effect until, for some limited period of time, while the facts are being better sorted out.

I think that the St. Cabrini Home is a perfect example of that. Right now they are running apparently, as they have run for quite a while and they are incurring debts every day, they buy milk and meat and if it is true that people aren't getting paid, that isn't anything that we particular like.

If this situation just goes on, and the rate is reduced and they are not paying their bills and they are threatened with closing in a couple of months, and if this situation is going on while the facts are being explored, that just gives me some problems. Just practical problems.

This, of course, the St. Cabrini situation isn't reproduced exactly in the others, but there are similar problems at least for some of these homes.

THE WITNESS: That's right.

THE COURT: Maybe all of them. So I am really here trying to think that there can't be a solution for something that I think is apparent to everybody here, that there are just problems on all sides.

I am not sure that the solution is just to keep on applying the rates and letting rather slow appeals procedures simply take their course, and the appeal procedure

-- would the regular appear procedure involve a critique of the kinds you have given?

THE WITNESS: It would be in reference, related to what they appealed, what they appealed for.

THE COURT: Another thing that concerns me is this. That here is the representative of the Health department saying: Well, you have the key to their finnancial picture and their compliance with the new rate and that has never been told until today in testimony, so, without any criticism, I am sure of a very hard working department and that's not even meant, I understand the pressures, but just from a cool objective look at it, something is not quite in tandem here so I am just articulating a lot of various factors and if we could sort this out, and arrive at some sensible procedure, then I think you would at least solve a major problem.

THE WITNESS: May I react to that, your Honor?

THE COURT: Yes.

THE WITNESS: Your Honor, the State of New York, the most generous state in the country when it comes to reimbursing nursing homes one billion dollars a year even if we put in these rates which are supposed to be cost, one billion dolla a year and it is true that we have never had in this State, and I am not sure if it is existing anywhere in the country, what we did here and that is prior -- a sort of a prior budgetary view where you really, line by line, look through this, they don't need this, they don't need that, that sort of thing.

THE COURT: What do you mean, looking through?

THE WITNESS: The report, there are reports, the sort of thing we have done here.

THE COURT: You mean here, meaning this afternoon?

THE WITNESS: Yes.

THE COURT: The suggestion of the $600,000 saving?

THE WITNESS: That's right. That's not the method that is used in this State to set rates or as far as I am concerned, in any other state, but the point I was making, your Honor, is that New York was going along okay and then came in prudent buyer.

Now, it does seem to me -- it does seem to me that if there is a law on the books and the nursing home industry, irrespective of sponsorship, is out there fully aware, in fact, unable not to be aware of the situation in New York State and New York City, unable not to be aware of that situation and we're going at a billion dollars plus with cutbacks and somebody -- the legislature has ordained that we have a prudent buyer concept in this state, it would seem to me that the average housewife does this every day and that's what prudent buyer is all about.

THE COURT: I tell you, I have to tell you that doesn't help me a bit because I don't know what it even means.

I don't know how that would be applied. Prudent buyer is a concept, that's fine. That concept is embodied in the statute which I have read, but the whole thing is application, and the trouble is that these homes were going along in a particular pattern, and maybe the pattern was not so good, maybe it was good, maybe it was poor as far as cost, but they were going along in a pattern and one must fact reality that when you are going along in a particular pattern of operation and cost in an inflationary time, and soembody, powers that be, cut your rate, people are going to have practice problems and they are going to have to figure out who is right and who is wrong in saying whether there can or cannot be cuts.

These are issues that have to be somehow sensibly explored and I can see problems from your standpoint of a great nature and problems from the State's standpoint, it goes without saying, but I just wish you would focus on reaching a solution here, because I am asked to enjoin the new rates and obviously, if I granted that injunction, and if that injunction were sustained by the Court of Appeals, there would be that kind of general court order to do that.

I am not at all sure that's a very satisfactory solution, just from a practical standpoint, and what I want to explore is doing something that will solve the problem in a better way than having a federal district court grant an injunction telling the State of New York that they can't change their rates.

I go back to the question of procedure. I don't hear anything.

Don't you have any suggestion? Let's just stick with St. Cabrini. How quickly could you have some procedure with them whereby this -- at least at best you can, you see how much of a meeting of the minds you could come to, at least it might bounce back to me or might bounce back to some other court, but at least make a start.

THE WITNESS: My problem, your Honor, is I was not aware we were going to focus on these five. We were talking about the nursing home industry which is 800 facilities and what I would like to say to you is I am more convinced now than I ever was that these five homes can all make it with their rates and without question. All of them. I am really convinced of that now.

THE COURT: These five have been presented in this court as sample cases, let's say. At least these are the non-profit homes which have come to this court with their financial information. So let's take those five homes for the moment.

We may have other problems.

THE WITNESS: We would be prepared next week to meet with each of those five homes, go over our analysis with them, and settle next week, assuming they are directed to settle.

THE COURT: What do you mean "settle"?

THE WITNESS: I mean, your Honor, if a 900-bed medical center hospital in the State of New York has nursing administration costs, the same as a 200-bed skilled nursing facility, your Honor, they've got to cut nursing administration. It just can't go on any more.

THE COURT: What procedure would you say could be carried out in a week?

THE WITNESS: I am suggesting, in answer to your suggestion, that we would get the same people that developed each one of these items.

THE COURT: Each one of what?

THE WITNESS: Each one of the reviews of each of the homes because they come from fdifferent parts of the state; we get them in Albany, we get our central office staff, they would being their staff, and next week we would meet with all five of them and we would go through this.

One of the homes, your Honor --

THE COURT: How would we wrap that up and put it on record?

Could there be some kind of a memorandum of your decision?

THE WITNESS: Absolutely. That's no problem.

One of these homes, your Honor, the commissioner has already, for the first time in the history -- since 1965, of our mortgage loan program, had to appoint one of our people to their Board of Trustees, because of the management problems of that home.

THE COURT: What's that?

THE WITNESS: The Mohawk Valley, your Honor.

THE COURT: Who is the trustee?

THE WITNESS: Dr. Frank Furta who is our assistant regional health director in Syracuse.

THE COURT: Why was he put on their board?

THE WITNESS: They have some real management proglems in that facility, your Honor.

THE COURT: What are the?

THE WITNESS: They range the gamut, excuse me.

There are deficiencies of various kinds, one of the major problems is the poor administration in relation to deployment of staff. That home is the only one of these five homes that not only isn't rated good state, not only isn't rated good federal, but that home is rated in our fourth from the top category of five, need improvement, and as a matter of fact, it is our position that in addition to savings being made, simple redeployment of personnel among other things would change that rating from a needs improvement to at least a good federal, and I think it is very important for the Court to understand what that would mean, because a different ceiling and a higher ceiling would be applied, with simple redeployment of staff.

We're prepared to meet with these five homes next week, your Honor. We'll do our very best to work up an acceptable procedure with them.

They have to be willing to enter into the same procedure, your Honor, it seems to me.

THE COURT: Well, certainly.

Let me ask you this. Trying to foresee what will come out, do you think it would be possible, in this week, to have these discussions and then have the department prepare in some reasonable detail, I know that there are time pressures, but something which I would just call findings of fact, and your determination and you answer yes?

THE WITNESS: Yes, I do, your Honor.

THE COURT: Okay.

Now, I think I asked you before, but let us suppose that they came back to you and presented facts that were different from what is contained in the reports.

I assume that you would have the power to adjust their rates accordingly, if it was mandated by those facts?

THE WITNESS: If it were clearly a rate appeal item and appropriate, we would have to do that.

THE COURT: Could that be done by your office or is there some further procedure that has to be gone through?

THE WITNESS: I don't see any problem with us doing it that way.

Estelle, do you?

MR. LOWELL: If your Honor please --

THE COURT: Just a minute.

MRS. WALL: No problem in our handling it.

THE COURT: Mrs. Wall, why don't you stand up.

MRS. WALL: No problem in our recalculating the rate.

Based upon their appeal, we could do that within hte week but processing it through for payment, I don't know, through Social Service.

MR. LOWELL: She said processing it through for payment is a different thing.

THE COURT: But we take it one step at a time.

THE COURT: Let me ask you this:

Let's go back to the example of the St. Cabrini Home.

The method of calculation of the new rate was described, I think, very well, by Mrs. Wall last week, and although I don't think I could recite it to you right now, but in a rough way I think I have it in mind.

Let's suppose that an inquiry go forward next week of the kind we're talking about today and I am assuming that the main thrust of that inquiry would be the position of the state that they could eliminate $600,000 a year in staff costs; right?

THE WITNESS: Absolutely, your Honor.

THE COURT: Let us suppose -- let us make the unpleasant assumption from your standpoint, that you are forced to conclude that the information supplied to you was wring and that none of that saving could in fact be made in the way that you were led to believe.

Okay?

That's the conclusion, honest, objective good faith conclusion after the inquiry next week.

Let us assume for the moment, how would that apply with respect to the daily rate they would receive?

What I'm getting at, doctor, is this: That I don't have in mind right now the relationship of staff costs to the rating system.

I know that the rating system. There were these things about 60 percentile limits and so forth, so I am not at all sure right now and this is my question: Whether even if they could justify all that six hundred, wouldn't they still be subject to some limit?

THE WITNESS: Some ceiling.

THE COURT: Some ceiling which would make you powerless to do anything. Is that right or is that wrong?

THE WITNESS: Except -- and the answer generally speaking would be the potential answer would be yes, here, except that the whole concept of appear mechanism within that, especially related to such things as patient mix was put in both for the hospital costs reimbursement and here to take into consideration those things that we're not sophisticated enough and no one has ever done a rating system successfully in this country, and one of the main parts of a rating system that we do not take into consideration in enough of a sophisticated fashion, is the question of patient mix.

That's why I keep returning to that.

THE COURT: How is patient mix taken into account in the rating system that is now applied?

THE WITNESS: It is basically not taken into consideration, in this sense.

Let me explain this: You could theoretically have -- and I stress theoretically -- you could theoretically have 200 bed nursing homes side by side, both get a good state rating or both get a good federal rating, it doesn't matter for the purposes of the illustration, but where the care needs of the patient in one home are far greater than the care needs of a patient in another home.

You would require more staff to give that bedside care in this home and clearly when you are gouping these two together, they are both rated the same clearly and very honestly, that home would suffer.

THE COURT: But let's not go through the mechanics, that home would -- in the listing and ranking of all the homes in that category for that particular period, what is the cost thing that that would relate to?

THE WITNESS: Whatever the area is.

THE COURT: What Mrs. Wall spoke of, the cost of --

THE WITNESS: Cost centers.

MR. LOWELL: Nursing care.

THE WITNESS: It would be nursing care.

THE COURT: What do you call it?

THE WITNESS: Cost centers.

THE COURT: Can we take a short recess?

I have to tend to something for just a minute.

THE CLERK: Court will take a short recess.

(Recess.)

THE COURT: I want to just pursue what we were talking about.

THE WITNESS: Yes, sir.

THE COURT: I think at the time you recessed, I think the concept I got and let me just try to review this, that if you were a nursing home with a very high degree or percentage of intensive care patients or whatever you call them --

THE WITNESS: Yes.

THE COURT: -- then on that particular cost center which I guess is called nursing, then you would be very high up in the ranking and presumably you might be very well up above the 60 percentile if you will in the very good or the good state?

THE WITNESS: Right, yes, sir.

THE COURT: Let us suppose that the situation was sufficient to -- let us suppose the situation was sufficient so that the application of the 60 percentile in that cost center had a material substantial effect upon the ultimate daily rate and I guess it could, could it not?

THE WITNESS: Absolutely, yes, your Honor.

THE COURT: Let's just suppose that one of these homes that would be discussing matters with you next week made that kind of a showing, would the commission have the power and ability to increase the daily rate to compensate for this particular mix of patients?

THE WITNESS: The answer to the question is yes.

Just to be technically correct, he does have to certify the rate to the director of the budget who makes the final certification, but the answer is that they would both be obligated in our view to make those changes.

I don't think there is any question about it.

THE COURT: In other words, you can in effect waive the 60 percentile?

THE WITNESS: Absolutely, yes, sir.

THE COURT: You would have the power to do that?

THE WITNESS: Yes, sir.

THE COURT: My law clerk has pointed out something here in the regulations which I guess may be one of the things you are referring to.

I might as well mention this for the record.

In Part 88 of this regulation, and this is 88.14a(7), I don't know how these things ever get transcribed by a court reporter, but it is 88.14 (a), and it provides as I am sure you know, "Request for relief from the celing provisions of this part for such relief of residential health care facility must demonstrate," and so forth, and there is something about patient mix in there and they must demonstrate that these are direct causes for all or part of the costs in excess of the ceiling.

Such relief shall not result in a rate which exceeds that based on maximum reimbursible state standards unless a waiver of such standards is granted by the commissioner

I would think you would be right under that that you would have the power if the facts were shown to do just exactly what you said.

THE WITNESS: Right.

THE COURT: Would it be fair to generalize that if in any regard there was a demonstration of sufficient facts to make it really inapporporiate to apply the percentile of the ceilings you would have the power to waive them?

THE WITNESS: Given the presentation of concrete factual material, no question about it.

THE COURT: Okay.

What we have is a proposal to review this in a week. And with the opportunity for the com missioner and his assistants to present their critiques as stated and an opportunity for the nursing homes, these five which are the ones at least I am now talking about, the non-profit, these five to present their side and there would be some kind of reasonable findings of fact and then at least the parties involved would have talked to each other in this case, rather than restricting themselves to this Court proceeding.

I would think that would be highly desirable and I think that even if there was no agreement then, the issues might be narrowed and put in better focus than they are now because I just can't ignore the statement of the second deputy commissioner that the Cabrini Home could save $600,000.

I just can't say that that is of no weight an I assume that he has other htings to say about the other four homes; right?

THE WITNESS: Yes, sir.

THE COURT: It is a question: Do I evaluate that or do the parties evaluate that getting together?

I rather prefer the parties evaluate that at least in the first instance by getting together.

What do you say, Mr. Stern?

MR. STERN: Your Honor, I would have to respectfully decline that suggestion.

I said at the last meeting that the parties have in fact been meeting for months outside of this courtroom and that we here represent a class and two associations and some several hundred nursing homes have been affected by what we say are arbitrarily imposed ceilings.

We have heard from this witness testimony or statement that the ratings were imposed without regard to acuity or intensity of patient mix and our quarrel is in part with the methodology and the rating, the method by which the ultimate rates were calculated.

If it takes a week to discuss five institutions, your Honor, there are several hundred others that are just as impacted by this and if past procedure be any guide, I can put clients on the stand who are here, who will tell you that the appeals process has taken anywhere from six months to 14 months, and this will not deal with the central issue.

THE COURT: I really don't regard anything that happened before this lawsuit as much of an analogy to the present situation.

By bringing this action, you have undoubtedly precipitated developments that didn't occur before.

The gentleman has stated that the first time that he has presented the particular critique is on the stand today. Well, that is one result of the lawsuit, and I think that it is -- that there is no doubt that the setting now is different from what it was before the institution of the lawsuit.

That's with no disrespect to anybody but I think that's true, is it not?

THE WITNESS: Yes, it is, your Honor.

THE COURT: I am certain and I will do everything I can to assist this, but I am certain that there will be about as prompt action in this regard as is possible and I think that the state thus far has come forward in pretty good fashion in response to this action. I think that the presence of Dr. Cicero today and what he has presented and I guess what he has prepared to present further, if we go into it further, is certainly a valid response to what I asked for last time.

Now, obviously, you don't agree with what he would testify, but I wasn't asking for him to come in with something you would agree to.

I was simply asking for him to come in with a detailed statement of his position. He's doing that.

So he has responded to what I asked for the state last time.

The next step is something that I suggested and that's that we have the discussions next week as he has proposed ending up in some kind of a findings of fact or whatever.

That doesn't cover the entire class by any means, but it is only these five as far as the non-profit homes, I only have financial information about a very limited number, and so it seems to me that you have presented the limited number as a sample or as actual cases, and if we deal with them, if we continue to deal with them in that fashion, it is not irrational, and if you tell me that you will not do it, you will not sit down, I don't understand you to be saying that, although you did use the word "decline," but I just couldn't accept that.

MR. STERN: Your Honor, to get specific assistance for nursing homes who have testified they are going out of business, I would never decline such an invitation.

THE COURT: Of course you wouldn't.

MR. STERN: But if I may proceed, the basic quarrel here,your Honor, is with a methodology which artificially limited reimbursement.

The Second Circuit Court, which has considered the issue that a freeze, any arbitrary limitation is illegal.

What Dr. Cicero has not impacted one whit is the verified complaint and the affidavits demonstrating that the 60th pcercentile was such a limitation.

Indeed, it had nothing to do with intensity of care, or patient mix, or any other situation. He has validated the allegations indicating the methodology by which this came about.

This is a money-saving technique, your Honor. The state has a valid concern for saving money. They can come in and have meetings --

THE COURT: This is beside the point.

MR. STERN: Your Honor, a witness from the state comes in and discusses philosophy.

THE COURT: I didn't listen to him very much about philosophy.

MR. STERN: If I am not going to be permitted to deal with the allegations of the complaint about methodology, if your Honor directs me not to discuss it, I won't, but

I respectfully submit that we have come in here on behalf of a very large class. We're prepared to produce additional information showing the 154 separate entities whose rates have been cut the same amount as the five plaintiffs we've put on or more, who are impacted by the artifical limitation of the 60th percentile and the state has not answered us one whit.

Sure, they will meet with five plaintiffs, your Honor, and perhaps they will say that they will raise them $3, $4, here's $5, and we'll come back in a week and you will turn to me as a representative of the class, and say, "Are you satisfied, Mr. Stern?"

Sure, I'm satisfied to the extent that St. Cabrini may have been saved going out of business, but I. am not here as counsel -- I didn't get five plaintiffs to run in and rush as a class action.

I was retained by two associations who are fundamentally affected by this, and their members are and Dr. Cicero has begun to testify about the dimensions here. There is a billion dollar health care industry; the state has set about what it considered to be valid basis to cut costs. They have simply done it illegally under federal law.

THE COURT: But that's repetitious.

MR. STERN: Factual allegations that to this date in the case have not been rebutted.

I respectfully submit there has been no denial of the allegations of the verified complaint.

THE COURT: I tell you, the more I analyze the factual allegations, the more difficult I find -- and I find great difficulty with your brief.

There was no attempt in your brief to really explain why these new costs were not reasonable. I went through your brief and I underlined every time the word "reasonable" was used and I never saw in that brief a really thorough, well reasoned discussion as to why these costs were not reasonable.

That isn't to say that it could not be demonstrated, but I didn't find that it was and an awful lot of work has been -- there's a lot of work to be done and I am perfectly willing to do it, but the problem as of this present moment on that issue is not sufficinetly resolved in my mind that I could think at the present time of entering a preliminary injunction on the issue of whether this rate structure violated any federal law or the constitution.

I think, I am not saying that you couldn't get it after further work. I am not trying to prejudge that in any way, but it just isn't sufficiently shown to me, the matter is not that simply and that's all I say about that.

I think on the procedural matter, you have a far clearer case but the best way to handle a procedural problem is to see if some better procedures cannot be adopted.

I know full well that if there was a violation of procedural due process, that can very often mean that the act was invalid and you strike it down.

I know that. But on the other hand, it seems to me well worth a week's time to allow the state to explore some procedures now in handling the matter, and also if some relief is necessary of an interim or preliminary nature, I will have an awful lot better idea of what relief is appropriate after this exercise, than I would without it.

And I also have in mind, and I went into this very carefully, which was not presented except on my questions last time, I went into the situation about when checks were coming in.

What is the timing here? No attorney gave me that. It is every essential.

MR. STERN: When the preliminary application was made, your Honor, the timing was the checks that were originally due in December.

At your Honor's request, we adjourned the hearing so then you are absolutely right, the timing became January by virtue of that.

In the course of this action, your Honor, that's correct, we have gone from one reimbursement period to another with the state applying its rates in some cases back to October billing, and applying it retroactively.

But, your Honor, what we did demonstrate as a procedural matter, your Honor, an undisputed procedureal matter, was the failure to consult with the Medical Care Advisory Committee.

I don't understand that, your Honor. With respect to the reasonableness of these rates, your Honor, I would like to cross-examine the witness.

THE COURT: He hasn't finished his direct.

You want to continue the direct?

MR. MANTZOROS: Continuation with direct will be as to each of the other plaintiffs, your Honor.

THE COURT: Right.

BY MR. MANTZOROS:

Q Doctor, do you have anything to add to St. Cabrini, before you finished, or should we go to the next one?

A I think we can go to the next one.

Q The next one is Mohawk.

Have you made an analysis and do you have any reports and state the basis upon which this analysis is made and state the results.

A Yes.

Well, Mohawk Vally Nursing Home is a 120-bed skilled nursing facility.

One of the intersting problems here is that it is related to a hospital. It is a hospital-based nursing home, and I will get into that a little bit later, your Honor.

Not the same situation here applies in relation to the patient mix question that came up earlier. We do not feel that they have a heavy patient mix caseload.

This was the home I alluded to previously concerning the fact that their overall rating was: Needs improvement, although I would like to add, for the record, they got at least a good federal in nursing, but not a good state in nursing.

I think that's important. I don't know if the Court is aware that we did make a mathematical error in our computation of the rate.

Their current rate which was $28.96, I believe, has been adjusted or will be adjousted, Estelle, by $14 upwards to $42.96.

THE COURT: Is that the affdiavit that was submitted?

MR. MANTZOROS: Yes, your Honor.

That's the assistant commissioner's affidavit, your Honor.

THE COURT: Okay, that's the affidavit of Mr. McCann, dated the 8th of December.

Let me just look at this testimony about Mohawk for a minute.

Will you give me those figures again?

THE WITNESS: The rates, sir?

THE COURT: Yes.

THE WITNESS: The rate that we had published was $28.96. That has been increased by $14 to, I believe, $42.96.

THE COURT: That's compared with the $49.32 rate which was in effect in 1975?

THE WITNESS: Is that right, Estelle?

THE COURT: At any rate, it is closer. That's fine.

Do you have anything else to say about Mohawk?

THE WITNESS: Yes, sir. I have already mentioned the fact that the Commissioner of Health, this is the first home that we have had to assign a member of his own staff to the homes Board of Trustees, which the law allows for when the commissioner is concerned about management, and that has been done.

The other thing is we did a similar analysis with Mohawk Vallue and we found that if they were better able to manage themselves and redeploy personnel appropriately, their rating would go up, plus they can save, we're computing -- and I think it is conservative -- $200,000 in actual savings, which would be about -- would average out for that home about $5 a day in the per diem, your Honor.

THE COURT: What would those savings consist of?

THE WITNESS: The gamut of across the board savings, in nursing care, for instance, the nursing assessments done for their patients show that the need is approximately 3.2 hours per patient per day.

They are presently staffed and costing at 4.25 hours per day. It's a lot of dollars, your Honor.

THE COURT: What's that figure again?

THE WITNESS: The nursing needs of the patients, we feel, average out to the need of 3.2 hours.

THE COURT: You are taying it should be?

THE WITNESS: That's right, and they are at

4.25, fully one hour more per day.

THE COURT: What is the figure, the nursing needs should be?

THE WITNESS: 3.2 hours per patient per day.

THE COURT: And they are using what?

THE WITNESS: 4.25.

MR. STERN: Excuse me, your Honor.

Did the witness say, "We feel that it should be"?

THE WITNESS: I don't know if I said that or not.

THE COURT: What is the basis for your giving us the 3.2?

THE WITNESS: That was done on the basis of the nursing assessments of the patients in the home, your Honor.

THE COURT: What does tat mean?

THE WITNESS: The nursing care needs of patients were analyzed.

THE COURT: And this was reported to you by this inspector?

THE WITNESS: Yes, that's right.

THE COURT: When was that done?

THE WITNESS: Itwas reported this week. When it was, I don't know, but the last point I wanted to make, your Honor, on Mohawk Valley is recall that earlier I had mentioned that this was a hospital-based nursing home and as such, they share services. The nursing homes share services with the hospital and in separating out a cost, there is an allocation of costs. So much of the dietary is allocated to hospitals, so much to the hospitals, so much to the nursing home, and I wish I could be more specific but I can tell you that our people, looking at that cost allocation from a Blue Cross standpoint, which you would want to allocate more out of the hospital and into the nursing home, we think that it is possible that there have been costs allocated to the nursing home that don't belong there, but belong in the hospital, and to be paid for out of hospital reimbursement.

That, basically, is my testimony on Mohawk Valley.

THE COURT: What's next?

THE WITNESS: The third one would be Daughters of Sarah Nursing Home.

THE COURT: All right. What about that?

THE WITNESS: This is a 200-bed nursing home that I dedicted, your Honor, in Albany, New York.

Initially Estell, as I understand it, they had a good federal rating.

THE COURT: If you want to question Mrs. Wall --

THE WITNESS: I'm sorry.

THE COURT: But let's try to be orderly. I would try to avoid that.

THE WITNESS: In any event, their initial rating --

THE COURT: If you want to have her come up, so you can consult --

THE WITNESS: I don't have to for this one.

THE COURT: Okay.

THE WITNESS: Their initial rating was a good federal and it was a mid-cycle rating and that, sir, all the component parts of the rating, the surveys that go into arriving at the rating had not been completed.

We had obligated ourselves that if it changed because of the rest of the survey information, we would make achange accordingly.

So there has been a change because for completion of our surveys showed that they should be rated at good state rather than good federal.

THE COURT: When was that completed?

THE WITNESS: I don't know, your Honor. I'm sorry.

THE COURT: The present daily rate allocated to Daughters of Sarah, what is that based on, the good federal or the good state rating?

THE WITNESS: That was the one that you had, is based on good federal.

THE COURT: You mean the $44.70?

THE WITNESS: Is good federal.

THE COURT: Well, now, can you give me an idea of what the adjustment will be and when it will take effect?

THE WITNESS: Mrs. Wall?

THE COURT: Do you know that, Mrs. Wall?

MRS. WALL: $46.

THE COURT: $46?

MRS. WALL: Yes.

THE COURT: Will that go into effect immediately?

MRS. WALL: Yes, it will.

THE COURT: That would be from $44.70. But anyway, that's something.

All right. Go ahead.

THE WITNESS: Your Honor, in our analysis of this home, in every area, medical services, nursing, physical therapy, leisure time and activities, social services, podiatry, speech therapy, optometry, we found -- transportation, we found thatyou could save over $451,000, not fall in the rating, which would be about a savings of over $6 in your per diem per day.

The other point we would make here, your Honor, is that they do have cash on hand of over $158,000, at least it is our understanding.

THE COURT: Have you seen those financial statements?

THE WITNESS: Our staff has, yes, sir.

THE COURT: I guess it is just a matter of looking at those exhibits and seeing what the cash is. Your cash figures aren't necessarily up to date.

THE WITNESS: I think they are the 1975 figures on this one.

THE COURT: I think we won't pause on the cash unless you have a pretty current figure.

Why don't you go ahead.

THE WITNESS: I think what I am responding to is that this is as a result of 1976 data.

THE COURT: All right.

The next one is the Margaret Teitz Center for Nursing, which is a 200-bed facility here in the city, and your Honor, that's a little unique in relation to the other three that I mentioned so far.

For your information 120 of those beds are nursing home and 80 of those beds are what we call a health related facility meaning the patients in there require less nursing and other type services than patients in the nursing home.

THE COURT: This is a health related facility?

THE WITNESS: Part of it. Eighty of the 200 beds.

THE COURT: Oh, yes, all right.

THE WITNESS: This had an overall rating of good state, the care is acceptable.

Our analysis which is spelled out here in the document before me, showed that and I do believe this was conservative for something I will get into later, showed that you could save minimum in this home without changing the rating, of $697,000, over $8 per day.

Our position is that the home could do that plus we know that they have in a fund at the home a $300,000 item of working capital that is presently there and available to them.

THE COURT: They said they have reserves about $300,000. What would the $8 per day do to their rate?

THE WITNESS: We feel on this one and the next one, that that still would leave them with some difficulty, no question about it.

THE COURT: Yes, it would, because you take the old rate for the skill care, the $68, and the new rate is $51, so suppose they save the $8, they would still be shy substantially in theory.

Now, what do you say about this?

THE WITNESS: What we say about that and what I am going to say to you about the Loretto Geriatric, which is next and the last one, your Honor, is that we don't think we have cut nearly enough, especially on the administrative side.

THE COURT: In other words, even the six ninety-seven, you think?

THE WITNESS: Is heavy.

THE COURT: Are you really going to get up to something that would cover the entire $17 drop in the rate for the skilled -- I don't know how you average these.

It isn't that bad a drop for the intermediate dropped from about $41 to about $35.

Anyway, I don't know what the cost saving would do but that's a problem.

THE WITNESS: Yes, your Honor, and I think that's the sort of thing that's amenable to discussion with the home that you had suggested.

THE COURT: It's all amenable to discussion.

THE WITNESS: Yes, your Honor. The last home is Loretto Geriatric Center.

This is similar to the Margaret Teitz Center in that it is a 520-bed facility and again has a mix of nursing home beds and health related facility beds.

In this case of the 520 beds, 180 are nursing home beds and some 340 are health related facility beds, and again I call this to your attention because the health-related facility patient is basically an ambulatory patient with much less care needs than a nursing home.

We ran into a similar problem here as with Margaret Teitz in that we found savings, and incidentally, your Honor, this is a good home, very good home, providing really good care, we found savings of over $265,000, which would average out across the board for both the nursing home and the health related facility, to be about a dolllar a day across the board savings.

One of the problems we had here was the same thing and the comment was that every department related to administrative overhead including such things as an educational reserve staff that they have on board, we did not feel that we had the data either here or Margaret Teitz, to make the judgment to allow us to come in a specific fashion which we wanted to be here with the Court, to tell you where they could cut.

I will say and I am not going back on my previous statement, that in particular with Loretto Rest, Loretto

Geriatric, and also with some of the others, we have sat down with them at prior times and gone over this very same thing with them, and there has been no cuts. But there are so many administrative costs that are amenable to at lease review, in both Loretto Geriatric and Margaret Teitz which we think will substantially increase our estimation of savings that one could achieve here.

THE COURT: The last hearing, Mrs. Wall agreed to review a cost statement as I guess no cost statement has been submitted.

Has Loretto submitted the cost statement?

MR. STERN: In accordance with your Honor's direction, they have.

THE COURT: Have you reached any conclusions on that?

THE WITNESS: Yes, your Honor. I guess the published rate was $42.30.

THE COURT: Is that what you have for your 1976 rate?

THE WITNESS: I've got $42.30 for skilled and $27.14 for intermediate.

The $42.30 goes to $48 for the skilled nursing facility.

THE COURT: Let me get that.

THE WITNESS: See how generous we are?

THE COURT: That has been revised to $48?

THE WITNESS: Yes, sir.

THE COURT: Has the intermediate been changed?

THE WITNESS: Yes, sir, between from $27.14 to $31.53.

THE COURT: Is that the last home you want to discuss?

THE WITNESS: Yes, sir.

THE COURT: Okay. Are there any further questions?

MR. MANTZOROS: One further question, if your Honor please.

BY MR. MANTZOROS:

Q Assistant Commissioner McCann, in his affidavit sworn to on December 8, 1976, which we've submitted but just for review, states in Paragraph 3 that there are about 103 of the facilities which rates would be decreased.

For example, if you could go back to the repealed 1975 statutory rates; is that correct?

A I don't know that to be -- the specific number of my own knowledge, but I know there were many that would go down and a hundred or so sounds like an appropriate number to me.

MR. MANTZOROS: If it please the Court, I am going to make an order here for the transcript which will certainly give to this Court, so that the Court may have at the earliest possible time, a transcript so if that may be of assistance.

We will work it out with the Department of Health so that everybody up in Albany will have copies of the transcript.

THE COURT: You do that.

MR. MANTZOROS: May I give your Honor a copy of the transcript of these last --

THE COURT: You will arrange that. All right.

MR. MANTZOROS: I have no further questions.

MR. STERN: Your Honor, may I mark in evidence the notes from which Dr. Cicero was reading?

THE COURT: I don't see why not.

Why don't you just mark them for identification and use them in cross.

MR. MANTZOROS: I don't know if you can admit them in evidence. You can use them for your cross.

I object to the marking.

THE COURT: He can mark them for identification.

These notes will be Plaintiffs' Exhibit 14 for Identification.

MR. STERN: Let's mark them separately, shall we, to make it easier. They are for different facilities.

CROSS-EXAMINATION

xxxxx BY MR. STERN:

Q Dr. Cicero, you read apparently from copies of each set.

Could you describe which one you were reading from?

For example, I have right over here on the left, a set of notes that seem to be identical copies of the Loretto Geriatric Center.

Which one did you read from?

A Both, as appropriate.

You will see that one has a paper attachment to it, and as appropriate during the discussion I used that as indicated.

Q Whose handwriting is the paper attachment in with respect to the one to Loretto Geriatric Center?

A I don't know. It was Mr. MacHarg.

Q So that you read from Mr. MacHarg's notes with respect to your testimony?

A Yes, he is the counsel for the Department of Health.

Q Was he present at the meeting at which these reviews were undertaken?

A Yes, in my office.

Q When did that meeting take place?

A When I was briefed? I am talking about the briefing meeting.

Q I see.

Would you testify to the briefing meeting what went on at the briefing meeting?

A Yes, we went through these papers in detail with the central office staff that was involved.

Q You mean these papers, Plaintiffs' Exhibit 14 were created prior to the meeting

A Yes, I explained that.

Q Would you explain that again, please?

A As I explained to the Court the Commissioner of Health asked peoplefrom the various regional offices to come in and bring their files in as appropriate and work with out central office staff, and they worked, I think Wednesday, all day Wednesday.

Q You were not present at any of these work sessions?

A I walked into one or two of them.

Q How long did you stay?

A Very short period of time.

Q And they were reviewing facts and figures, were they?

A Yes, that's how they got to this.

Q What were they reviewing?

A Survey documents, cost documents.

Q Do you know what cost documents they were reviewing?

A The cost documents of the home, I assume.

Q Did you see it yourself?

A No, I did not see it myself.

Q Do you know what survey documents they were reviewing?

A The survey documents of the home.

Q What survey documents?

A What survey documents?

Q Yes.

A The P.M.R.'s and the survey documents that the department has been doing since 1966 on every facility in the State of New York.

Q Did they review the H.E. 2's?

A I assume so. I don't know.

Q But you don't know?

A No, I don't know.

Q Then after that meeting, Plaintiffs' Exhibit 14 for Identification which are five separate documents, each copied once were created by somebody in the department?

A That's correct.

Q Who?

A You mean everybody's name who created them?

Q I show you one says Loretto Geriatric Center. Who created this document?

A Well, let's see now, the staff -- the central office staff that was involved was Dr. Glen Haughie, Mr. Raymond Tobiah, Mr. James Tunney, Dr. John Warner.

Q Were they all at this meeting?

A Mrs. Ann Lee.

Q Were they all at this meeting that you walked into?

MR. MANTZOROS: Your Honor, they can have all the cross they want but aren't these figures going to be verified next week, so we can get the accurate perfect truth when the reports come into your Honor?

I have no objection to the cross but it will save time.

THE COURT: I don't think that it is a matter of verification of the figures. I think it is a matter of the figures he has presented are not just sort of balance sheet figures or income statement figures.

These are figures about somebody's belief about cost savings that can be effected.

This is a complicated thing. He has made it perfectly clear that he didn't go out and visit these homes. He is basing his analysis to a large extent on reports he obtained from staff people. I have that.

This is like an offer of proof. It is not an offer of proof, it is his testimony about what he believes on the basis of reports.

The problem is that I assume that there would be very hot controversy over what you stated and I assume that there has got to be a way to resolve that controversy in some reasonable way and that's why there was a suggestion of getting together next week.

I don't take these as gospel. These are estimates.

MR. STERN: Estimates that somebody called in from a survey team, that told somebody else who typed it, and then Dr. Cicero was briefed and he comes in here with a dramatic statement that we feel that we can reduce this by $600,000 and your Honor asks him whether anyone every told that to the nursing homes, the answer is no and the rating systems weren't even -- says Dr. Cicero weren't even calculated to deal with the problem.

On that basis, your Honor --

THE WITNESS: That's not the problem.

MR. STERN: Your Honor is suggesting and we're going to follow the suggestion that Dr. Cicero's statement that: Yes, now we see that we can save $600,000, is to provide the basis for a delay in deliberation here, so that five homes can come in and argue with him on that basis.

Where would we be a week from now with respect to the class, your Honor?

It doesn't make the methodology one whit? The procedure that your Honor houtlines.

We're going to do it because we're going to do it to help five homes stay in business, but that doesn't get to the fundamental issue of the 60th percentile and what's in effect an illegal freeze.

MR. MANTZOROS: That's why we're asking for the interrogatories for all of them, and we're willing to do it.

This is the order to show cause. We want all that information in the interrogatories. If he wants the class, we're going to do it

THE COURT: Just a minute. I think you have to understand, Dr. Cicero, that all of us and I should think you're one of the parties in your department, have to come to some reasonable conclusion pretty quickly as to whether there is or is not an emergency with these homes.

The reason I am inviting some voluntary consultation here, if you want to call it that, is because I am convinced that your agency is just as interested in keeping these nursing homes open as anybody else in this room; right?

THE WITNESS: Your Honor --

THE COURT: Just a minute; am I right?

THE WITNESS: Yes, we built them and I dedicated one of them.

THE COURT: So there are obviously widely different views about different things, but the basic objective of keeping them open is really not in dispute.

We do have a question of time. I think that it wasn't possible and it wasn't necessary to fly off last week or the week before and enter some kind of an injunction and I think it would have been inappropriate in every conceivable way, but there is a limited amount of time here and I think that what I am reaching for is the best guidance I can get and I think that you are reaching for the same thing, the best guidance you can get on some basis reasonably quickly, if there is an emergency, you want to know it quickly; right?

THE WITNESS: Yes, sir.

THE COURT: That does not permit, it seems to me, a case by case look at every single one of the 150 or 300 nursing homes either by you or by me; right?

THE WITNESS: Yes, sir.

THE COURT: What I really have in mind, these five homes were brought in as insurance for the non-profit people. They showed me specific information, so I have taken these as some kind of a sample, and I think you had better regard them in the same way, and I think you've got to realize that I am not just interested, and I am sure you are not just interested in the five homes and in isolation.

We all have to come to some conclusion as to whether there is an emergency with this whole group, how bit it is, who it affects, but nobody has time during this period, to exhaustively go into the facts of all -- whatever number of hundred it is.

So I think that I sense from you, I don't really have any question, that you are entering on to this thing with that spirit. It is the only sensible way to proceed and we try to come to some conclusion, reasonably quickly on the basis of a sample on the basis of any other analysis that can be made.

I say reasonably quickly because I don't want to tie myself down to a deadline or anybody, but I regard each week as quite vital.

Are you with me?

THE WITNESS: Yes, sir.

THE COURT: Okay, so you are welcome to cross-examination. I don't think the -- if you want to make a record, it is not particularly useful to me to know that he got it from Mr. X or Mr. Y.

I assume he got it from Mr. X or Mr. Y.

MR. MANTZOROS: We will provide, if your Honor please, those affidavits that are the supporting background from those teams.

We will have those within a few days, next week. We could get that background information in that method and we'll also get an affidavit from Social Services, whose assistant counsel is here.

THE COURT: We're piling up a lot of papers and that isn't going to get -- you file what you want but the mail thing is to get to work and to get the problems resolved and know whether we've got an emergency or whether these people can save all this money.

Now, of course, you talk about firing people. I don't think you used the term, but if you reduce staff, does that not create some cashflow problems in and of itself?

In other words, suppose some home is running along now, it's got a particular level of staff and it's not paying its bills and you say it could save $600,000 a year, if they reduced the staff.

THE WITNESS: Yes, sir.

THE COURT: I don't think you can simply discharge staff without running into somepretty heavy liabilities on termination pay or something like that. So you will take that into consideration, will you not?

THE WITNESS: Yes, sir.

THE COURT: Okay.

MR. STERN: Your Honor, just so I can understand what your Honor has stated, your Honor assumes then that the witness does not have personal knowledge of that to have that to which he has just testified with respect to the $600,000 reduction that St. Cabrini can make with respect to its overall administrative costs.

THE COURT: I assume exactly what he has testified to is that that there are people whose business it is to make inspections whose business it is to report to him and he is used to getting those reports and he evaluates them on the basis of those reports, and whatever other knowledge he has and he comes to a belief and a judgment based on that.

But I think it is also apparent that such a process is only a start and it has to be verified, inquired about, challenged, so it is what I say, no more, no less.

It is exactly what he testified about.

BY MR. STERN:

Q Dr. Cicero, can you tell us how the 1975 rates were certified, were calculated?

MR. MANTZOROS: I think that's irrelevant, if your Honor please. It is in the statute.

THE COURT: Overruled. Objection overruled.

Q Pursuant to what standard did the Department of Health caluclate the 1975 reimbursement rates?

A All rates are calculated basically in the same way.

Your Honor, I am not a technical expert in this but when you raised it before, I was thinking how I tried to think about it and I think about it as you take the cost in the base year, allow me to explain this to you, for '75.

Q You didn't hear my question. I said "standard."

You mentioned the word "prudent buyer." Was there a standard, any standard applicable to the calculation of rates in 1975?

If you want to continue the answer, but I just thought you might have misunderstood.

A I did misunderstand. I apologize.

Q What standard exactly?

A The whole question of relating the rating system which is 2803 of the Public Health Law to the method of determining rates for residential health care facilities which is 2808 of the Public Health Law, both those two provisions of the Public Health Law came as part of a nursing hom reform package in 1975.

However, they were not linked, they were not linked; okay?

Q I am talking about the rates for 1975.

A That's what I am talking about.

Q Those that were calculated in 1974 to become effective January 1, 1975?

A Again, that's what I thought. You mean how we did it.

Q What standard was applicable?

A Reasonable cost standards. Efficient production standard.

Q Right, efficient production.

A 2807 was applicable.

Q And under that standard that was applicable for the 1975 rates, did not the Department of Health have to certify to the Director of the Budget that these were the reasonable costs of the efficient production?

A Yes, sir.

Q Were there any standards or were there any provisions for the disallowance of costs which were not found to be reasonably related to the cost of efficient production.

MR. MANTZOROS: Your Honor, please, this is going to the merits and this is a repealed statute in 1975.

It is all in the papers and it is in the statutes, it is a repealed statute. You can't revive it.

THE COURT: He wants to work with a comparison.

MR. MANTZOROS: All right.

BY MR. STERN:

Q What methodology was there for disallowing or exclusion costs that were not found to be reasonably related to the cost of efficient production of services?

A There was a formula. I don't know all the details, but it had ceilings. It has always been basically the same, you have administration, housekeeping, dietary, you couldn't go over 115 per cent of the average and you had salaries and the idea was the same in my mind as prudent buyer, very similar concept.

MR. MANTZOROS: You asked the question and that's an admission because he opened the door, if your Honor please, and I don't think he can attack his own witness.

He made him his own witness with this type of testimony.

THE COURT: Mr. Mantzoros, please.

MR. STERN: Your Honor, could I have the witness' last answer read back, please?

(Read back.)

BY MR. STERN:

Q In other words, in 1975, the efficient -- for the rates to be calculated in 1975, the efficient costs provisions was in your mind something similar to the prudent buyer concept?

A Well, yes. The question of similarity is: Do you try to reach an efficient production standard. No question about it.

Q In fact, if a facility was not getting or producing its services efficently, then it should not have been permitted to get its costs?

A The question of should not or did it is separable here, I assume.

THE COURT: I think we're just -- Mr. Stern, you have really got such different ideas about what should be done here, but I am going to bring this to a close as follows:

I am going to direct and I am going to come back to the profit homes in a minute -- but I am going to direct that during the next week up to December 17th, commencing at the earliest possible time, whatever you can arrange, but commencing at the earliest possible time, the Department of Health undertake to present to the five non-profit homes referred to, all of the criticisms and suggestions about cost savings that the Department of Health wishes to present and do this with as much specifics; in other words, lay out everything that they have and they want to suggest.

At the same time, the five nursing homes can discuss their financial condition and their emergency problems with the Department of Health and, of course, this particularly relates to any attempt they wish to engage into rebut the criticisms and suggestions of the Department of Health.

That latter, of course, is the main issue. Because that's really what the Department of Health has come back with in the way of challenge to the alleged mergency.

The deputy commissioner has mentioned a period of a week and this project has to be tailored to that week.

THE WITNESS: Yes, sir.

THE COURT: The findings of fact and conclusions have to be presented to me at a hearing which we will have next Friday.

I think that the point has been reached where the time is critical so that I think the attempt has to be made to deal with the most illustrative samples that you can find and do whatever can be done within this week, and that will be just about it.

Now, we come to the profit homes, in what we call the facilities case?

Financial information has been filed relating to 10 homes and they have not even been discussed here this afternoon, and we will not take time at the present moment to go into that in detail.

I simply want to ask you, Doctor, whether you or anybody in your staff have attempted to make an analysis thus far of those profit homes.

THE WITNESS: No, sir, not a similar analysis to these.

THE COURT: What do we do about that?

I can't shunt them aside. They have to get takenc care of. I think, included in next week's project has to be a selection of those homes which --

THE WITNESS: To do this analysis of them.

THE COURT: I think your staff has to simply broaden the inquiry and work on those hones in the same way and I think that you have to recognize that at this juncture anything that you don't successfully challenge is going to be accepted as a fact.

MR. LOWELL: If your Honor please --

THE COURT: Because that's -- these facilities have prepared financial statements and they have come in and they have provided a great mass of information by now and so unless it is challenged, those things will naturally be the facts in the record.

THE WITNESS: I understand.

MR. LOWELL: If your Honor please?

THE COURT: Yes.

MR. LOWELL: With all due respect to the Court, I have been sitting here for a number of days and except for one or two contributions, including your Honor's countesy to me last time, because of my chronic illness, I haven't had a chance to say a word.

I submit to your Honor that this is a study in frustration with respect to what you have proposed to Dr. Dicero.

No matter his good faith, because if your Honor will ask him the question whether or not, after they have done what they have suggested, and it proposes an increase wth respect to the rates, whether or not the Health Department and Social Services Department can put those rates into effect, this honest man will say no, we cannot. Why not?

Because the budget director of New York must approve ever increase.

One step further. It has been said to me directly and Dr. Cicero confirm again as an honest man, that no further money is available.

THE COURT: Why don't you ask him that? Why do you quote him without asking him?

MR. LOWELL: I am not in this case yet, your Honor. I am not in this case. You are establishing a procedure. I haven't had a chance to outline my case. I would not accept the procedure that your Honor has used with respect to my case.

I have tried cases in this court. I was an assistant attorney here for four years. The plaintiff has the opportunity to present its witnesses first, not the opposition.

I happen to respect Mrs. Wall, but she tried this case last week, Mr. Mantzoros got up here and tried the defense before you here the affirmative case.

I've got a case here which I think is excellent. I've got a case here which I think you will give a preliminary injunction on but I dpn't want to hear what Dr. Cicero has to say when you haven't even heard what I have to say or what my witnesses have to say.

We're in a situation, if your Honor please, where if it is necessary to wait on this period of time, I respectfully urge your Honor to send this case to another judge.

We're not next January. Ours is the 16th of this month with respect to half of our facilities when the next check comes in based upon the new rates.

MR. STERN: That's the same with the volunteers, also, your Honor.

MR. LWELL: The 16th of this month, not January 10th, as someone told you last time.

With respect to this entire problem after you get finished with the procedure, you just outlined, and which Dr. Cicero has gracefully agreed he will do at your Honor's suggestion, you are going to be in a position where it can only be effective prospectively starting, what can we say, with respect to the 800 facilities at five a week or at 10 a week.

How many of them are going to be taken care of during this next period of critical time?

If your Honor does not want to have a preliminary injunction in this case, for reasons which I am unable to understand,after a review of our affidavits as submitted in the complaint, your Honor. I will come here Monday morning not next Friday, and try this case from 8:30 in the morning, subject to your other commitments, until 8:00 o'clock at night, every single day next week on the merits. Not in a preliminary injunction, on the merits. It is too late now. The preliminary injunction isn't going to make a damn bit -- excuse me -- isn't going to make a bit of difference.

WeAre prepared to say forget the preliminary injunction. We wanted a preliminary injunction three weeks ago. Then we would have said okay, whenever your Honor wants to set this down for trial,January 2nd, you will try it.

Your Honor, I have had these cases over and over again. It takes three months of diligent work by a man of your talent, much less judges who know a lot less, to understand the intricacies of what we're talking about. And you have sought, I know what your purpose has been -- you have sought voluntarily to get the State Health Department and the counsel to come to grips with this problem because you feel a sympathy for it.

I stated toyour Honor, flat out on my integrity as an attorney and an officer of this Court, they cannot do what you would like them to do. They are barred by the budget director and the governor of this state.

They will not get any more money for this purpose. Mr. Mantzoros'principal argument which you have not heard, is there is no more money anyway, you are barred by this.

Section 40 and 41, there is no appropriation even if this Judge orders these new rates they are going to challenge your authority, because they don't have any money to do it which by the way, your Honor interests us to an interesting situation which Mr. Mantzoros did not understand.

If they do that after your Honor has made that decision, they are out of sync with the Medicaid Program and the federal government's 50 per cent contribution gets yanked back and then all these facilities are going to be on the State of New York's responsibility.

These are some of the problems we have been trying to talk about. We have procedural difficulties in the promulgation of these new regulations and these rates which are so bad that four or three, I have forgotten the number, courts have already said that they are wrong in the state courts.

We came here because the federal government has set up a procedure, federal government has said you must give reasonable cost related rates. They don't even pretend they're reasonable cost related rates and to the extent they can do what your Honor suggests which is a very healthy idea, a new concept as Dr. Cicero has just said to you on his testimony under your questioning, that can only be effective from the time on when they can do this for the 800 facilities.

If your Honor will grant the preliminary injunction between now and February 1st, and instruct them to do this, between now and February 1st, I assure you on behalf of my clients, the 240 or 250 of them, we'll line up in Albany at their offices and have the kind of survey that he just made with respect to the five volunteers go into, so that we can be authorized to reduce our costs as he sees fit.

But at this point, my clients are in a position, your Honor, if they cut back after their surveyors tell them they must put something in effect, they have risked the following: Fines, penalties and going to jail. Because they have violated the hospital code.

The hospital code of this state is mandated by this department. It is a champagne code and they are giving beer reimbursement, and they will be the first ones to admit it.

THE COURT: You correct me if I'm wrong, Mr. Lowell, and if my system of dealing with papers is faulty, why I will make amends to you.

But my understanding is the document I have before me in the way of a brief in your case was submitted today and is merely a draft brief.

For someone to be demanding in stentorian terms that you are the need for immediate relief when you have not submitted a brief to me until today and it is marked in big red pencil draft on the front, I don't think that it really is worth entertaining.

MR. LOWELL: If your Honor please, I suggest to you, sir, that my case isn't even on yet. I deliberately marked that draft because your Honor requested certain additional affidavits which we submitted today.

THE COURT: Then I think we're getting closer on our scheduling, but the point is that when you say it isn't on --

MR. LOWELL: I was under the impression you were trying the other case. You were hearing the other. We haven't been heard.

THE COURT: Then, Mr. Lowell, please, I am just afraid I am confused by your presentation.

If you believe we're hearing the other case, then why do you stand up and object to my not granting relief?

I thought you were objecting to my not granting relief to you and your clients.

If you are talking for Mr. Stern, I think he has done a pretty good job of talking for himself.

As far as your case is concerned, I signed an order to show cause returnable on December 6th.

MR. LOWELL: It was signed December 2nd, your Honor, returnable December 6th.

THE COURT: You have been present and I have not really thought in terribly technical terms, it seems to me that we discussed your case at the last hearing, we asked for the submission of affidavits to provide the financial information, so I haven't really been treating your case as something that we don't even talk about until a certain date.

MR. LOWELL: No question.

THE COURT: But in order to rule on your case, it is necessary for me to have your affidavits and your brief and I now see that I just got a draft brief today.

MR. LWELL: You have not had a brief filed with you, sir.

THE COURT: All right. Now, it seems to me that that leads me to two things. I do not think that you have any ground at all of indicating or stating that you should.

You are somehow denied something by not having relief right now and I don't know what you exactly said in the last few minutes, but I was certainly given the impression that I should really practically act for you yesterday.

Well, I am not going to discuss this thing with you in this way and I am saying to you right here and now that I expect you to complete your record by a brief and whatever affidavits you submit and you can do that hoefully as you possibly can because I certainly have studied these briefs to the extent they have been submitted and I will study yours the minute it gets submitted and I will study the draft, but it happens I have been in court all day and so I haven't had time to read it.

I go on to the next point.

As far as the work next week, there is no delay involved to you in undertaking that work with the department. I cannot see how in any stretch of the imgination it is an exercise in futility.

If it turns out to be an exercise in futility, in some way if the state is acting in bad faith, if they are playing around, I will draw the strongest possible inference against them.

As far as the budge director, I would be happy to have you ask the question of the gentlemen, but in any event, I will just for the moment assume that you're right.

Stiff if this department, the Department of Health, comes forward with sensible findings of fact and so forth, I guarantee you that I am a lot farther along in this case than I would be without it.

If it appears to me that they concede that rates should be raised and then the budget director is not going to raise them, your case and the other gentleman's case is a lot stronger by virtue of that, forgetting the relief.

I don't have any doubt about that.

Now, let me just ask you. I was under the impression when I asked you before and this was really my intent was, would you have the power to raise the rates?

THE WITNESS: That's what I meant, your Honor.

THE COURT: So this gentleman brings up a poit and it is a good point.

If you don't have the power, I wanted to know it but I am not going to -- it doesn't mean I am going to call off the procedure.

THE WITNESS: I understand that, your Honor. I attempted to broaden my responsibilities by taking it out of the commissioner, per se, because he does have to certify the rates to the director of the budget.

What I am prepared to say right now, I can't speak for the director of the budget, but the director of the budget knows full well that that 8.14, whatever else it is, is in there and averybody in the State of New York knows that we have to honor our own regulation.

MR. LOWELL: If your Honor please, the laughter you have heard is because of the number of time when the department has not done that.

Can I ask him one other question?

THE COURT: Certainly you may.

CROSS-EXAMINATION

BY MR. LOWELL:

Q Dr. Dicero, has the Commissioner of Health been advised by the budget director that there is a limited amount of funds available for Medicaid purposes?

A For Medicaid purposes?

Q Yes, for Medicaid reimbursement purposes. Is that a term you didn't understand, Medicaid purposes?

A Well, I would have to answer your question, I am not aware that for Medicaid purposes there is a limited amount.

Q Yes.

A I am not aware that he has told Dr. Whalen that.

Q Are you aware that anybody in the state government has advised that there is a cap on the amount of funds which are available during the year for the payment of Medicaid reimbursement?

A Stanley, I am having trouble.

THE COURT: Now, listen. This is not productive.

Whether the Department of Health or whether the federal district court reaches the conclusion that more money has to be paid, if that conclusion is reached, then that's going to be a very important conclusion, and we take the next step or the Department of Health takes the next step and sees about available funds.

But we're not at that and it is ridiculous in my view to say that we do not engage in a further fact-finding process because the budget director is at the end of the line.

It is not even worth discussing. We will adjourn the hearing and you have my directions.

THE WITNESS: And I understand them also.

THE COURT: I expect them to be carried out and we will excuse --

MR. LOWELL: There's one further thing I would like to know.

THE COURT: Okay.

MR. LOWELL: We have submitted approximately 10 affidavits and 10 financial statements, and your Honor has directed them to analyze those together with the ones submitted by the other plaintiffs.

At the end of this week, are we then going to be faced with the suggestion that we should now analyze the other 780?

THE COURT: Have you been listening this afternoon?

MR. LOWELL: I listened very carefully.

THE COURT: The answer is no, and the hearing is adjourned.

MR. BRADLEY: Excuse me, your Honor, I have not had an opportunity to say -- may I make one point?

THE COURT: Yes.

MR. BRADLEY: We have received financial information from 10 of the plaintiffs in the facilities case.

The Health Department in Albany, however, has only had an opportunity to look at five of them and I will have the other five at the conclusion of this hearing.

I am not sure, and I think we would have to ask someone from the department.

THE COURT: Let me just cut you short.

Doctor, in this period of time, I do not know what you can do with all 10, and I am simply saying to you you have to work with these gentlemen and pick the most illustrative examples, because whether it is five, 10 or 15, it's not going to be all of them, and we will never get to all of them. We have to do it on that basis.

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JHP

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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NEW YORK ASSOCIATION OF HOMES FOR
AGING, INC., et al.,

Plaintiffs,

vs   76 Civ 5113

PHILIP TOIA et al.,

Defendants.

---------------------------------------x

NATHAN KLUGER et al.,

Plaintiffs,   76 Civ 5233

vs

PHILIP TOIA et al.,

Defendants.

---------------------------------------x

NEW YORK STATE HEALTH FACILITIES
ASSOCIATION et al.,   76 Civ 5320

Plaintiffs,

vs

PHILIP TOIA et al.,

Defendants.

---------------------------------------x

New York, N. Y.
December 17, 1976 - 11:15 a.m.

Before HON. THOMAS P. GRIESA, District Judge.

APPEARANCES:

STANLEY LOWELL, Esq.,
Attorney for New York State Health Facilities Association

LOUIS J. LEFKOWITZ, Esq.,
Attorney General of the State of New York
CHARLES A. BRADLEY, Esq.,
Assistant Attorney General

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(In the robing room.)

THE COURT: We are going to have a larger hearing this afternoon, and I guess it is a good idea to get somewhat organized this morning.

Do you have anything to report to me?

MR. BRADLEY: Judge, I have not heard from Health. They are on the road, coming down for the hearing this afternoon. I have not had any reports as to what occurred yesterday.

THE COURT: What is going on this week?

MR. BRADLEY: With respect to the proprietories, four of them -- I believe it is four -- we noticed at least three; presumatly the fourth -- met with Health yesterday, and the result of those meetings will be brought to your Honor's attention this afternoon.

Now, the Health Department advised me that it was only going to be physically possible for them to do those four.

With respect to the balance, I am told that there will be reports available and testimony available as to what the Health Department has done by way of review of their position with respect to these others.

I hope to have that material when I get back to the office and be able to incorporate it into affidavit form by three o'clock this afternoon.

That is where we stand.

MR. LOWELL: From our point of view, if the Court please, what happened was, I received a phone call on Tuesday morning from Dr. Cicero, whom you met. His assistant called me and said these four should be in Albany on Thursday morning. I said, "What about the other five? The Judge said you couldn't take the four, or you should make the decision."

I called Mr. Bradley, and he said his recollection of your Honor's direction was that they should look at all nine, if possible, of course.

THE COURT: Obviously, even the nine are only part of a larger group, so I realize there had to be a sample here. "Sample" isn't a good word, but I knew in a week they couldn't do even all nine.

What have they done?

MR. LOWELL: They did the four. You said I should let the four go. I brought in an affidavit saying with respect to the other five they should have made some attempt to examine into it or, as Mr. Bradley said, submit an affidavit. Since they submitted their affidavit last week, I have for your Honor and will have for Mr. Bradley my original memorandum, supplemental memorandum with respect to the affidavit and several points your Honor raised and my responding affidavit to the affidavits Mr. Bradley and the others --

THE COURT: Can you file those with us?

MR. LOWELL: I can give them to you and give them to him --

THE COURT: You can consider those filed. We will take them right now.

The only thoughts I have right now --

MR. LOWELL: Just one other point, your Honor.

I have received telephone communication from three of the four who were there, and they will, I hope, be prepared to be in court. I have instructed them to be here at three o'clock.

I have some notes on what they told me on the telephone. We will be prepared to examine or affirmatively testify with respect to what happened or summarise for your

Honor in five minutes what our view is of what happened.

THE COURT: I will tell you, Mr. Bradley, what I think the State has to consider.

Number one, I can't say that I or my law clerk -- all of us have just done every ounce of work we could possibly do on this case. I am sure there is more we can do, but the situation is very complex.

Without being critical of any of the briefing, I think the briefing has tended to slide over, and I think this is true of everyone. There are some very difficult questions of interpretation and so forth on both procedure and substance, but one thing emerges in my mind, and this is just tentative, but I would like to ask the State to think about it.

Speaking in a very, very rough, general way, it seems to me -- and I am not trying to make any rulings, so I don't want to be estopped from doing something different -- I am posing this to you because I think the time is now coming when the action has to be taken by somebody or decision not to take action.

It appears to me, subject to further argument, that what happened this year was that a number of forces sort of converted that operated to cause a charge and a review of the rating. The Federal Government adopted its provisions which necessarily would result in a review of the rating system over a period of time. The State, due to its various considerations, became interested in making some changed.

Now, the problem I see is that the revisions, changes, reconsideration and the rating system really could not be done intelligently overnight. The reconsideration, or whatever was to go on or contemplated by the Federal Government dictates that all of that really contemplated a fairly long period of time, and it really had to be.

Despite all the briefing, I have some questions about the particular requirements for notice. I have seen reference to a City day notice, but nobody, until Mr. Lowell's new brief comes along with it -- nobody has really dealt very carefully with what it is that gives the sixty-day notice requirement.

There are problems of what statute applies to what, and that has really been left to me to pretty much sweat through without sufficient help from counsel. So I am not prepared, even now, to really state any careful analysis of the procedural problem, but in a kind of rough way I would say to you that what I think happened was that despite all of the overlying mass of regulations and statutes and problems and interpretation and so forth and so on, you had a change of rates that came into effect November 1st. That is complicated. It apparently benefited some homes and disadvantaged some homes -- all very complicated. But at least some homes had their rates reduced really without any notice as of November 1st, in the middle of all this complicated reconsideration that was to go on.

If a home has been going along in a particular pattern of operation, and let's assume they are not conducting a real, intentional rip-off and not defrauding anybody, not filling their beds with healthy, young people or anything of that kind of stuff -- let's just assume there isn't any outright fraud. They have made a judgment as to the level of operation and administration, and they have been running along on that basis, and they have been getting a particular rate, and the State comes along and reduces the rate, and it doesn't give them any notice, any opportunity to be heard. It doesn't give them any critique of their operation and any time to phase out people or raise money for termination pay. It just slaps the new rate on.

If that causes a financial emergency in that home, then I think that it is a real problem, and it would seem to me it is a problem from any sensible standpoint, whether a standpoint of the Court, the Department of Health, the Attorney General's office or anybody. That stands out as a problem.

I've got a big "if" there. If it causes a financial emergency in that home. Such financial emergency isn't demonstrated in all cases, by any means, but I think the time has come that the State has got to figure out what position it takes on what I have just talked about.

I am not saying that there should not be a change in the rating system. I am not saying one rating system is bad and another is good. All I know is that the whole subject is being reconsidered, and while that reconsideration is being undertaken and really started, the State comes on and changed the rate.

Now, let us assume that you've got a nursing home which is not committing fraud; it is trying in good faith to do a good job, and assume it is losing money, and I have in mind the Cabrini home.

Let's just suppose it is a home you deal with.

MR. BRADLEY: We can safely assume there is one similar to that.

THE COURT: I just can't believe that you would oppose some remedy here. I don't think it is a matter of a legal battle here, but a matter of practical good sense.

Somebody can come along -- Dr. Cicero can come along and say, "Well, they can save money by discharging a whole lot of staff." You don't do that overnight. You don't do that as November 1st when you are told about the new rate November 15th. You don't do it even as of December 1st or December 15th. If you are going to fire a whole lot of people, that has to be thought through. Is Dr. Cicero's suggestion a good one or isn't it?

You just don't suddenly walk in and say, "Ladies, you're fired." You just don't do it that way. If you fire them, there are probably thousands and thousands of dollars, whatever has to be paid to do that.

I am sure I don't even conceive of all the problems. If we were dealing with a lawsuit over a $10,000 claim about whether somebody had paid for goods sold and delivered, you can expect some scrap, but you don't expect that here. I don't expect that here. I expect a sensible view from the State of New York.

I am perfectly willing to consider what their limits are. If they actually don't have the money in the bank, I want to know it. I am not talking in the context of constitutional rights to be enforced in regard to budget restraint. I am talking about the problems from everyone's standpoint, but I frankly can't believe that the loss is so horrendous that the homes who are in an emergency can't be provided for for an interim period while the new rates are being worked out in the consideration of the Federal mandate on all of that stuff.

I just don't think the State of New York has gotten to that point. If these homes close, they've got burdens from other reasons, and we all know that. You've got a lot of elderly people that will have to be provided for.

I think we've got a problem created by two precipitated actions without sufficient notice taken at a time when the wheels of reconsideration are really starting but have not concluded. I think we can talk for seventy-two straight days on this.

I'm pretty sure there can't be any relief on a class basis. I'm pretty sure it has to be relief on a selective, individual basis. There has to be some practical way to handle this.

Surely, the State has thought about this.

MR. BRADLEY: They are considering it. I have asked them to give me a position, let me know.

THE COURT: Who is going to be here today?

MR. BRADLEY: Dr. Cicero is going to be here today. I hope to be meeting with him at two, possibly one-thirty.

THE COURT: You convey my view. I recognize as well as anybody when Government money is available there are people who might want to get their hands on it who don't deserve it, so I don't want to be overwhelmed by a lot of unmerited requests for the money out of the public treasury.

I have great respect for the problems and for the State and what they are trying to do and all of that, but when all is said and done, I think what I said a few minutes ago is the picture that emerges, and I think something has to be done in selective cases.

You can't come back this afternoon and just try to act like it's a debate. We are not having a debate here, where people are trying to make as many points as they can. That is not the scene.

MR. BRADLEY: I agree.

THE COURT: I think something has to be done in some cases, and they better figure out where to get the money and what to do and not come in here thinking that they can continue the debate.

MR. LOWELL: May I say one more word, Judge?

THE COURT: Yes.

MR. LOWELL: Your Honor is probably aware of the fact that Judge Lasker has been involved with respect to the hospitals, who are very much in a similar situation, which was brought on some time ago. It went up to the Second Circuit, and they affirmed Judge Lasker's injunction he had granted by reason of the state action, not identical but somewhat similar circumstances.

In the last forty-eight hours or so, maybe seventy-two, Judge Lasker has insisted that the plaintiffs' attorneys serve an order to show cause, to cite the Budget Director for contempt of course, because they have not complied with respect to the payment of certain moneys that are putting the hospitals in an impossible position.

I only tell the story because I know what Mr. Bradley has to go through.

Also, Cicero says, "I have my instructions."

THE COURT: Why couldn't somebody from the Budget Office be here this afternoon? Ask them to be here.

MR. BRADLEY: I don't know of anyone, Judge.

THE COURT: I want to get the position of the Budget. I don't know about Judge Lasker's case. I wasn't there. I have to deal with my case.

If Judge Lasker's case is a precedent for my case, that's fine, and I will be happy to go in and see what the legal precedent is. What did it involve?

MR. LOWELL: A much more narrow issue, in that the State Hospital Association, the plaintiff, moved in and said, "You didn't file these changes with the Federal Government, HEW, as required, didn't amend the State plan, and therefore you can't do this." And Judge Lasker spent a good deal of time on it and decided for them in a preliminary.

THE COURT: He enjoined what?

MR. LOWELL: From putting the new rates in under the new schedule amending provisions of the regulation. Ours is a different section that now governs. He did it on a narrow basis that they just had not done all the things they were supposed to do, and then he said, "Do it, and then we will come back to the substantive issues," and, frankly, that is the way we thought you would handle this, because it is complicated.

Then they went to the Circuit Court, and, as I understand it, they sustained him on that and said, "Pay them all the money since January 1st, because you haven't done what you are supposed to do under Federal law," and they just refused.

THE COURT: Even the procedures aren't all that clearcut here. I wish they were. They have refused to pay?

MR. LOWELL: They have just done nothing on it. I can't say they have refused. Nothing has happened.

THE COURT: Is there a Court of Appeals opinion?

MR. LOWELL: There may be a Circuit Court opinion. This is on a narrow issue.

THE COURT: Is it a useful precedent for me? I understand you are bringing it up to show the problem.

MR. LOWELL: Just to show the problem. Actually, we have cited it in our case just for the flavor involved there.

THE COURT: I think you better get somebody. Tell them a representative from the Budget Office is directed to be here as soon as possible this afternoon. They can take a plane down. If it isn't two-thirty, it can be three or three-thirty, as long as they are here.

I'm not interested in playing games. I don't think Dr. Cicero is doing that at all, but there are lots of different agencies involved. Tell them that I so direct.

Thank you.

(Recess.)

THE COURT: Note the appearances of David J. Stern and Jeffrey A. Mishkin for the New York Association of Homes and George C. Mantzoros, assistant Attorney General.

We have spent endless amounts of time on the mass of papers, and the situation is still foggy enough that I don't think there is any single issue that I could cite to you as a clearcut statementwith reference to the City day notice situation, but nobody on either side is trying to really trace the statutes and deal with the problems of interpretation and so forth.

As far as the substance is concerned, it is immensely complicated, but I will throw this out, subject to further argument.

The way I size it up -- and I will speak in rough terms -- is this: that both the Federal Government and State Government this year really started a process or reconsidering the rates. That is all to the good. The Federal, through statute or regulation, imposed some requirements that would cause a re-evaluation and reconsideration of the rates. The State Government, through its necessities and considerations, peculiar to it, also wished to have a reconsideration of the rates, but in any event they would have been required to do so by the Federal Government.

The trouble is that before this process was completed, before it could possibly be completed, the State of New York jumps in and, as of November 1st, lowers rates. I say lowers, because the change of formula actually may have raised some rates for some homes, but it did in a lot of cases lower rates.

I think that if I am correct, even the prospective lowering was somewhat retroactive, because the notice of the lowering as of November 1st didn't get around until after the 1st of November.

That is really quite unfortunate for the ones who got lowered.

Let us assume there are homes who are not committing fraud, who aren't filling beds with dummies and so forth. They are acting in good faith. And let's further assume that they have gone on in a particular pattern of operation for quite a while.

Their costs are in accordance with that pattern of operation. Let us assume in good faith they thought that this was required, this pattern of operation was required for the sound administration of their home, and they thought it was required by Government and State regulations. Anyway, they had been operating that way.

Again, let us assume fraud or gross negligence or anything like that, and some of them are losing money, indeed, even at the rates that existed before November 1st.

Now, all of a sudden, with little or no notice, the State lowers the rates, and it lowers them in this setting that we have talked about.

Now, the State can come along; Dr. Cicero can come along and testify as he did last Friday -- and I have the utmost respect for Dr. Cicero in what he says -- but the State comes along and says, "The solution to your financial emergency is, you can save $600,000 a year by reducing your administrative staff."

Well, that could be true, but to broach that idea after the rates are lowered in the course of a series of preliminary injunction hearings -- I am not trying to be critical of him, because I know they must be working under pressures that I probably don't know anything about -- but the fact is, this is the way it came about.

Maybe it's a good suggestion; maybe it's a bad suggestion. Who knows. The one thing you do know is that if somebody is talking about changing the pattern of operation of a nursing home, reducing staff substantially, well it takes a little consideration. One would have to think about it. You just don't say, "Dr. Cicero says this. Good-buy. You're fired", and fire your staff. You have to think about the consequences of that. Financially you have to think about how much termination pay would be required. You would have to think about a lot of things. You just wouldn't do it overnight.

So the main thing is that there may be lots of reasons for changes. Maybe the new formula is a very good one; maybe it will have to be further modified; maybe there are areas of nursing home operations, individual home operations which should be changed.

What I am saying is, there may be lots of areas where changes could be made and should be made, but you don't do that in the way that it was done. You don't simply wake up November 10th and say, "Your rates are lowered," and three weeks later you can, "You can change your operation and save $600,000."

That is one way to really create some problems for somebody. If I were running that nursing home, I could be the Albert Einstein of nursing home management. I don't think I could quite cope with that.

If this procedure has in individual cases resulted in financial emergency, then I am fairly well convinced that something has to be done. I am also fairly well convinced that probably it can't be done on a class basis. It has to be done, I think, on a selective basis, because there are some homes who have been advantaged by the change; there are some homes who probably aren't really in any grave danger; but there apparently are some who are in a really serious bind, and they just can't turn around on a dime.

I think we have to focus on it that way, and, as I told the other gentleman, I don't expect to have a debate here I think this is not a case where everybody scraps. I think this is a case where everybody has basically the identical interest, and there just has to be a practical solution to some problems, which really have been created by the State, at least precipitated by the State by acting too quickly.

And so I expect this afternoon to go at the problems. I don't expect people to come in and try to win a lawsuit by debating, offering additional points. I expect -- and I think Dr. Cicero was in that spirit -- I expect to have some statesmanlike approach to practical problems and really, without getting too technical, I think I could probably spent lots and lots more time and come about where I am.

Mr. Lowell, who was in a few minutes ago, is convinced that the Department of Health can make all kinds of concessions and findings, but the Budget Director simply would not pay money. Well, the Budget Director is a defendant here, and I have directed through Mr. Bradley that a representative of the Budget Director be here this afternoon. I don't want to work in any kind of a vacuum.

So the net of what I am saying is, I don't pretend to really know all the intricacies of all this, but these are the main points, and I just have got to have an approach that way.

What has been going on in Albany this week?

MR. MANTZOROS: I know they finished all five in our case, and I understand some in the other case.

THE COURT: They worked on four?

MR. MANTZOROS: I believe so.

THE COURT: What did they come up with?

MR. MANTZOROS: I haven't talked to them. They have a full report for your Honor this afternoon.

MR. STERN: I was at the meeting, your Honor.

MR. MANTZOROS: They will have a detailed report.

MR. STERN: My clients were told on Monday to be there at ten-thirty Tuesday. There were five separate meetings, chaired by an attorney of the Department of Health.

Basically -- and I use the Cabrinias an example -- the representatives of the Department of Health said the suggested cost savings that Dr. Cicero says they could effect were derived by taking what the home in the 60 percentile got and saying they were over the 60 percentile, and therefore it should save that much money, because of the average 200-bed home in New York spent $48,000 less than Cabrini, say, for nutrition, then Cabrini should spend $48,000 less for nutrition.

I asked the representative, "Have you been in to the home? Do you have any suggestion?" The answer was no.

THE COURT: Is the Cabrini in this intensive --

MR. STERN: Each home, your Honor, says, "My God, we have" -- every home has a different problem. One says, "We have psychiatric problems, and we have to have a psychiatrist." Another says, "Our average age is eighty-six."

THE COURT: Let's say St. Cabrini, because we did talk about this patient mix last time, and I don't actually remember now, but was St. Cabrini one that has a very high intensive care?

MR. STERN: St. Cabrini's nursing director says they have many patients who need rehabilitation, and the recommendationof the State, your Honor, was that St. Cabrini immediately fire thirty-six of their forty-four registered nurses in order to effect the savings that Dr. Cicero said that they should make.

MR. MANTZOROS: If your Honor please, I don't want to get into hearway, but I heard there were some admissions from some of the nursing homes that certain cuts could be made. I think your Honor evaluated it correctly.

THE COURT: How do we balance it, though? I think that's very possible. The thing I think is going on is that there is a very thorough reconsideration of the rate structure.

In the period of the next four months or so next year, there will be a consideration by the Federal Government and so forth, and so I think it would be most inappropiate for this Court to get into the merits of a rating system, because that would be taking over from the Federal Government and the State Government work that they are now doing.

If somebody had come in and said, "This is final; this is the final word," then I suppose I would have to get in and review that final word. Nobody has said that or is saying that now. It would be absurd for me, it seems to me, to do what is going to be done in the Federal agencies and State agencies and is being done.

But I am worried about an interim situation, where prior to the working out of all of this, rates were lowered, and then some suggestions were made afterwards as to how they could accommodate them, how they could adjust to the lowered rates.

That is not very sensible.

Now, certainly if there are some cuts that can be made quickly and that really should be made, that is all to the good, because the taxpayers' money should not be wasted.

You talked about accommodation. How do you make an accommodation here?

MR. MANTZOROS: May I just say, as I am appraising, although I am involved in it, I am trying to take a look from an objective standpoint at the whole situation.

Your Honor, I think your evaluation is correct from the general aspect as to what happened November 1st and the cost and everything. I would agree with that, and I think it is an accurate evaluation.

I think what the whole complication with all these cases is is this:

In the structure of Government -- and the Government operates massively -- to the extent that they may be lulled into some sense as to a jurisdictional question -- and I am not trying to raise any technical question -- someone may feel that -- and we raise the objections like we have to under Rule 12, including the Eleventh Amendment -- to what extent there is a reliance in the bureaucracy in the general sense, they say, "Look: this is a State matter. Article 78," and many of the points I have raised at certain times, They do not realize that to some extent the Court may want to inquire in the preliminary injunction matter, into the merits, and that's all right.

THE COURT: You advise your clients I am not dismissing this case, and I consider I have jurisdiction, and if they want to mandamus me to get me to dismiss it, they can do it.

I am not saying that in a pugnacious manner. I will rule on that right now.

MR. MANTZOROS: If your Honor please, if you see the picture -- and I am not making the suggestion for such a ruling -- in the distance, in the channels -- some of these people I have never met -- to get it across, and I have called attention to it. I said I want the merits in the court to some extent.

They say, "What about the Eleventh Amendment?" I said, "Leave it in there. It's thrown in there as part of all my defenses."

We did go further in this case, your Honor, more than in any other case. This Court has made this inquiry to this extent with a very meticulous -- I think your evaluation on November 1st is accurate.

THE COURT: I want to make this clear on the record. Mr. Mantzoros, I get your point, and it is a good one, and if the signals are not clear they should be clear.

I am saying to you right now, I have considered your jurisdictional defenses, considered the points you raise under which you claim that the action should be dismissed and should proceed no farther.

I am saying here and now, without trying to dictate a lot of reasoning and case law and so forth, I am saying right here and now that I decline to dismiss the case. Right now I intend to go forward with the preliminary injunction matter in whatever way seems to me appropriate, and I feel that I clearly have jurisdiction at this stage in the case.

I think there are Federal questions raised that are valid, and I want to say it to your clients as clearly as possible that the case is not being dismissed on the basis of the Eleventh amendment or any other jurisdictional or technical defense at the present time and will not be dismissed at any stage that I can foresee which relates to the preliminary injunction problems.

I say that for the record, and you can convey that.

Let's get on with the next question. How do we resolve the problem that I have raised and which I think you have recognized?

MR. MANTZOROS: The second point that may be in the overall evaluation, if your Honor please, there are two other factors, and to what extent they need further refinement and finding out about. What are the appropriations? Are we faced here with two immovable objects,and which one do we move?

There may be something, although as to the November 1st date it may be abrupt or however we describe it. There may be to some extent, without shifting blame from the other side and saying, "Let's go to court," not to ask them to help us out or to comply.

On the other hand the key part here may be to what extent, even if we had Mr. Goldmark down, does he have appropriations available to him to diffuse or to make this turn-around?

THE COURT: Mr. Mantzoros, it seems to me that there are some unknowns that we got to get more crystalized. On the question of whether money is available -- I will start again. I am aware of the case law that says you cannot violate constitutional rights; you cannot use budgetary considerations as a reason for the violation of constitutional rights. I am putting it truly, probably. I am not getting in that framework now. I think for the same of a preliminary injunction when we are talking about a balance of the hardhsips, you have to know what is the hardship, and the hardship, as far as we are concerned on the defense side, is taxpayers' money and budgetary problems.

We've got to know the extent of the problem. That means that there has to be some assessment of the homes that require additional interim money, because they are in an emergency state by virtue of the November 1st rates.

That is a question of fact, and we've got a lot of information, and we can come around to some reasonable aseessment pretty quickly.

But that right now isn't finally established. I haven't made a finding, and I don't think I could make a finding of those homes where I am convinced or where it is stipulated that the facts indicate that X dollars are required per month to prevent them from closing or to prevent them from doing something else that is financially very bad.

In other words, how many homes, what amounts of moneys are required to take care of the emergency cases, or however you want to say it.

When that is sort of arrived at, then we know a dollar figure. At least, we know the dollar figure we start with, and there may be additional problems, people coming in with additional presentations, but we can start with what we have.

Then, at that point, I guess it is up to the State to say, "Do we take the position we have the money, or do we take the position we simply don't have the money? We could not write those checks.

"So you can issue all the orders you want, but you are issuing the order for a dry bank account."

I don't know what that position would be, because we haven't approached it quite to that extent.

I would assume that if we are talking about additional payments for a period of months of a few hundred thousand dollars, I would assume the State can afford that. I really can't believe that they couldn't write the checks, because if the homes indeed close, somebody is going to have to take care of those older people, and probably some other pot of the taxpayers' money is going to have to do it.

If we were talking about a billion dollars in the next six months, that would be one thing. I'm sure we are not even talking about anything like it. So we are talking about budgetary considerations, and the first thing to do is to find out the amount of money that is being talked about, and I really haven't had too much information about that as yet.

MR. MANTZOROS: Your Honor, in this evaluation -- I am talking now in the practical context, and I think your Honor has evaluated again correctly -- they may not feel that if there is something to be done here in the interim and if it can't be done from a practical standpoint, that this will not taint the ultimate reasonableness of what they are trying to accomplish, which would be this new factor of the economy, and, as your Honor described it earlier, if there is any interim relief in this turn-around period, that this necessarily doesn't taint or become --

THE COURT: We are too smart for that.

MR. MANTZOROS: We are open on that question, still.

THE COURT: Of course. We can have all kinds. Whether I issue an order or whether there is a stipulation, it can be couched in ways that make it very clear that this is without prejudice to an ultimate finding that the home should reduce its staff or that the rate formula should be changed or any other relief or any other thing that should be done in the light of the circumstances which will become known and aren't really fully known now.

MR. MANTZOROS: I wasn't asking your Honor for a commitment. They are laymen and have been in the administrative field, and they need an education. This will be helpful in my discussions with them to get greater efforts to see if something can be accomplished.

THE COURT: Mr. Stern?

MR. STERN: I feel obligated to come forward and point this out to your Honor.

In the hospital case that is before Judge Lasker, my information is that an order that the Judge entered in August required the State to pay certain moneys. I think it is about $40,000,000. And Judge Lasker had this on an order early this week, directing defendants Whelan, Goldmark and Toia, I believe, to appear in court today at three o'clock to show cause why they should not be punished for contempts.

There has been a specific order entered in that case. I think in response to that order I believe they say, "We may pay it now but want to work out the timing."

THE COURT: Mr. Lowell brought that up. I think all of you are concerned about this, that perhaps you can have concessions or admissions by the Department of Health, but when it gets to the Budget Director, they simply don't pay, and that was brought up last week, and Mr. Lowell brought it up again.

That is a sufficient warning to me that we better get representatives of the Budget Director in this courtroom, because we don't want to go through a lot of work and leave out a big part of the equation.

What do you say to this, Mr. Stern?

The thing that comes to me is as follows:

The evidence indicates strongly to me what we really have here is a problem that must be dealt with according to the individual nursing home, and I just don't see how I could grant relief on a class basis. It seems to me that the most that could be done by this Court would be as follows:

Recognize we are at an interim time, where rates are being reconsidered. Recognize that it would be inappropriate for me to really rule on the substance of a rating system or try to make any ultimate ruling on how efficiently or inefficiently a home is run and that kind of thing.

But simply taking just exactly what I said earlier, you have a potential problem created by this sudden lowering of rates in November, and I call it an interim problem because those rates are subject to reconsideration and review, so we are at an interim stage in this whole process.

It seems to me at the most there is a good case for some interim relief while the final picture is being worked out. But interim relief for whom? Well, if I said interim relief, I mean just go back to the pre-November 1st rates. That would apparently take money away from some and give money to others.

MR. STERN: Which I am authorized by the two associations, in the light of the dire straits of the health care industry -- I may represent for so many facilities that would be preferable, because there are too many homes who are in the process of self-destructing.

One of our plaintiffs yesterday just fired twenty-six people, a psychiatrist, an aide. He said, "Stern, you failed us. We can't wait."

THE COURT: Tell him to come in. He can see me.

MR. MANTZOROS: Let's get the whole facts.

MR. STERN: Your Honor, I started off by saying I am authorized on behalf of the two associations to say that they would not object to that.

THE COURT: What associations are these?

MR. STERN: The New York Association of Homes for the Aged and the hospital --

THE COURT: Representing the non-profit homes?

MR. STERN: Yes. And the Hospital Association of New York.

Your Honor --

THE COURT: Are there two associations of non-profit homes?

MR. STERN: Yes. In this case, your Honor, the Hospital Association of New York has homes which are hospital-based, and the New York Association of Homes for the Aged has a variety of other homes, and there is something between a hundred and two hundred homes.

THE COURT: What is the total number?

MR. STERN: Mr. Harper told us recently it was one hundred sixty in the New York Association of Homes for the Aged.

MR. MISHKIN: I think the total would be over two hundred.

MR. MANTZOROS: I think the total is 286.

THE COURT: Don't you know how many people you represent?

MR. STERN: We represent the two associations on behalf of their members and the five individual plaintiffs. The associations themsleves are subject to fluctuating memberships.

MR. MANTZOROS: I understand there are 286 nursing homes, your Honor.

THE COURT: You can't deal on this basis on a kind of mass basis, when you don't even know the numbers. I would expect, if I am going to grant relief, I would know the names, locations of homes.

MR. STERN: We are not asking for relief to an association, your Honor. I was merely pointing out in terms -- it was pointed out to our client at the outset that one of the possibilities was in a preliminary injunctive setting that some homes could have their rates reduced if the rates were stayed completely, although it is not without precedent to do it on a selective basis with respect to just the cuts.

They said, "Well, whatever is the greatest good for the industry, we are prepared to authorize you to do that," and I deel with the sterring committee in that respect.

I have a listing of all those homes whose rates were reduced. That has been compiled for me, based upon the hospital memorandum.

THE COURT: You present that this afternoon. Who has authorized what? You call one the hospital homes?

MR. STERN: The Hospital Association of New York and the New York Association of Homes for the Aging.

I will have the executive vice president of the New York Association for Homes for Aging report.

THE COURT: Let's take the Hospital Association of New York. They are one of your clients, and their members operate nursing homes; isn't that right?

MR. STERN: That's correct, your Honor.

THE COURT: About how many do they operate?

MR. STERN: I believe the membership of Hospital-based nursing homes is thirty. There is a cross-pollination, your Honor, so the numbers are imprecise.

The client has great difficulty giving us the exact numbers.

THE COURT: Let's take that association. The members of the association who are running nursing homes: have some of them had their rates raised and some lowered?

MR. MISHKIN: Your Honor, we have on the lists about 154 non-profit homes.

THE COURT: It is important for me to take each association. Are they members of the Hospital Association of New York?

MR. MISHKIN: I understand -- and it will be confirmed this afternoon -- they are all the New York Association for the Aged. We can clear it up this afternoon.

THE COURT: If you are talking about a representation that they would accept the old rates, what I would like to know, even if it is just in approximate terms, is how this representation has been arrived at. Has a committee or an officer made that decision, or have they polled the members? And what authority do they have to say that certain homes who have had increases would go back?

That is not a small question. I think you better get -- this is serious enough that I think that you should have a list of the members of the class you represent, and if there is any difficulty, if there is any question about an association speaking for them, you should have a list of who is in what association. This would probably be pretty hard to find out, and I would not expect you to have it quickly, but at least you ought to have some rough information as to whether in this association there are some of these that have gone up and some that have gone down.

That is crucial to me.

Finally, the question I mentioned, what authority, who is representing that they will accept old rates? The same thing is true for the other association.

MR. MANTZOROS: There is a conflict of interest, in a way.

THE COURT: They are doing the best they can.

MR. STERN: Your Honor, I would point out again -- and we will have it in court this afternoon -- in the New York State case, which is presently on appeal at the Appellate Division, Third Department, that Court entered an injunction against the rates being applied retroactively. Insofar as that retroactivity reduced payments it left standing any increased payments until the decision is reached on the merits in Whelan.

THE COURT: That is a possibility.

MR. STERN: I just said that because in the context they felt in light of the freeze et cetera, keeping homes at the increased rate, in the light of the fact they haven't been increased at all in '75 was not in the nature of a windfall and split it out that way.

THE COURT: Mr. Mantzoros, the reconsideration of the rates in line with the Federal guidelines, submission to the Federal Government by the end of the year and their review, that I am assuming is part of the reconsideration process; right?

MR. MANTZOROS: Yes. I think we can consider it that way.

THE COURT: When will that process be finished? Is that possible to say? Will it be April?

MR. MANTZOROS: I want to clear up as to what happens January 1st, which I have in one of my briefs --

THE COURT: The State rates get submitted to the Federal Government, don't they?

MR. MANTZOROS: Whether there will be a change I don't know. April 1st -- that one will be a full reconsideration, but not January 1st.

THE COURT: What do you mean? By whom?

MR. MANTZOROS: A real change in the rate. I don't know that there will be a real change in the rate January 1st.

THE COURT: The Federal Government is going to review the State rates. Aren't they supposed to come back and give their comments?

MR. MANTZOROS: That is my understanding.

THE COURT: When will that be?

MR. MANTZOROS: I did not want to throw your Honor off the track by any representation that there would be an increase or decrease January 1st.

THE COURT: If the Court did nothing and nothing was done, I understand that these rates, the November 1st rates, would keep on going at least through January 1st.

Mr. Stern?

MR. STERN: And months and months beyond.

THE COURT: January 1st is not a magic date for any change of rates. But is there a date when you believe that there will be new rates?

MR. MANTZOROS: April 1st, as I understand. I did find out yesterday. In my discussion with counsel for the Department of Health, I asked, "When would you give the new rates?" And he said, "I think about February 1st."

THE COURT: Who is going to promulgate the new rates?

MR. MANTZOROS: I think the rate processor is the Health Department.

MR. STERN: The statute makes these rates, your Honor, through March 31st. What Mr. Mantzoros is saying is that the State itself, giving sixty-day notice on February 1st, is going to attempt to put in new rates on April 1st.

THE COURT: What is the procedure? Are you going to receive comments? What is the procedure that is going to be gone through in order to decide on the new rates that will be effective April 1st?

MR. MANTZOROS: I don't know the mechanics, but I think we can find out this afternoon. Dr. Cicero will be here.

THE COURT: Nobody had an opportunity to talk about the November 1st rates?

MR. MANTZOROS: I haven't asked them. Maybe they did as to the mechanics as to the Federal Government.

THE COURT: I think there has to be notice of hearing.

MR. MANTZOROS: I assume that whole situation would also apply for those plaintiffs in all these other cases.

THE COURT: What I am suggesting is this -- I am sorry, Mr. Stern.

MR. STERN: No, no. Go ahead, your Honor.

THE COURT: I think we are approaching a point where it is very clear that some relief has to be given to somebody. What I have in mind is not a kind of a blanket declaration that the new rates are invalid, unconstitutional and so forth and so on. I have in mind -- and I keep saying this because I think it is important -- a procedural problem and an interim problem.

It seems obvious to me -- and I am talking about this because somebody is going to have to get out their calculator and calculate dollar amounts -- it seems to me that April 1st -- I mean the interim relief would go through March 31st, subject to any extension if it is necessary, if something happens to it, but I don't foresee that. I am just using the dates you have given me.

So what we have involved, it seems to me, is a period of November 1st -- we've got five months. Now, what

Mr. Stern says is that -- I think this is the substance of your comment -- it is not practical or fair to have each individual home come in and prove financial hardship. Just the fact that five or so have come in and made their showing, one must recognize there are many others in the same boat, and we are not going to end up too much better off by spending our entire Christmas holidays hearing applications from three hundred different homes. It may be a waste of everybody's time. Not that Christmas holidays are so important. That isn't the point -- but if there is a general problem, we might as well recognize it.

Another viewpoint could be that the only people who get relief are people who come in and prove dire financial conditions, and I mean closing. I think it would help out to find the answer, to find out how much money it would cost.

Let us suppose we approach it this way: that every home who had its rates lowered got the rates reinstated and nothing else was done, and there wouldn't be any compensated reduction of rates that had been raised. But I am not sure he has authority to do that.

MR. MANTZOROS: They may not have the risk of closing. I don't know.

THE COURT: Is there any way to estimate the amount of money it would cost the State over a period of five months to reinstate those rates which had been lowered?

MR. MISHKIN: That should be a very easy figure to compute.

MR. MANTZOROS: If there are 286, that's about 150 of them.

THE COURT: Another thing that might be possible is, regardless of whether the association has authority, if I am going to say that there was a procedural due process violation on the November 1st rates, maybe just simply cancel it out for a period of five months so that the people who got raised get theirs canceled, and the ones lowered get theirs canceled.

Maybe that is the better way to do it, and maybe that would be better financially for the State, to simply keep the raised ones in effect and increase -- well, you get my point.

I want two calculations. I don't know how you arrive at this, because I don't know the full list of people, but you've got to work with the attorneys and come up with whom they are talking about.

Suppose you simply reinstated the November 1st rates, whether it would now involve a reduction or an increase, you simply reinstate the November 1st rates for a period of five months. What would it cost?

MR. MANTZOROS: I don't know if it is included in the affidavits.

THE COURT: I don't think it is.

For the input to that, you just have to work with the attorneys and get it. But I assume that would be a fairly easy figure.

Then I would like to know how much it would cost the State if this relief applied only to people whose rates were lowered, to put them back to the rates before November 1st, and then I would like to know if there are any actual problems of cash flow that would prevent payments being made, and I cannot believe there would be. But if there are, I would like to know it.

MR. MANTZOROS: And the $40,000,000 and where that is coming from.

MR. STERN: I don't think it is $40,000,000.

MR. MANTZOROS: That Judge Lasker is ordering, if they can find that. That's to rob Peter to Pay Paul.

THE COURT: This case should have been transferred to Judge Lasker, and then he could coordinate the entire budget.

MR. MANTZOROS: There may be other factors here.

MR. STERN: Your Honor --

MR. MANTZOROS: They will be in about two-fifteen.

THE COURT: Mr. Mantzoros, the more I think of it, the more I think there is a real problem about this quick action November 1st, now, and I think we would be getting into an unbelievable nightmare trying to hear individual cases of individual homes.

It isn't that long a time. They really should have waited.

MR. MANTZOROS: It is in the context of the other factors, your Honor.

THE COURT: If they are having a problem, have them come in.

Mr. Mantzoros, in this context there is no reason for any litigation in these cases. There is no reason for having depositions or any of that stuff. You are in the process of reworking these rates. I don't think there should be any litigation at all. It would be utterly foolish to undertake this consideration in this Court.

MR. MANTZOROS: The other courts did not do what your Honor is doing. That is all I am saying.

THE COURT: If you can get the State to agree to a five-month stay on this, on some reasonable basis, perhaps that would be the answer.

MR. MANTZOROS: Your Honor, they have been jammed up answering interrogatories, and the attorneys even have been testifying. That is all that I have been doing up there: answering interrogatories, taking depositions, including the Department attorneys.

THE COURT: I am not responsible for those cases.

MR. MANTZOROS: This explains the overall picture that there is no stonewalling.

THE COURT: Let's hear Mr. Stern.

MR. STERN: Your Honor, with respect to the individual home situation or the irreparable injury I am beginning to get a sense, that is, assuming -- let's suppose St. Cabrini said to me, "Okay, Mr. Stern. We are going to fire our forty nurses to somehow comply and run with one nurse." Even if that could be done and they would somehow manage to stay in existence for six months, the harm is a greater harm, and it will have irreparably changed the character of the home, with the nurse telling me it can't be done, but if the State forced them to do it, it will become a warehouse. That becomes part of the irreparable injury.

THE COURT: I think it was implicit in what I said earlier. I think these are very, very serious questions. If somebody comes along and says, "Fire a hunk of your administrative or nursing staff," when a pattern of operations has been going on, you just don't change that pattern of operations with a flick of the wrist. It takes very serious consideration.

All of that is what I have in mind, and I don't think you can glibly accept any of that. It could be true. In other words, maybe after a period, after thorough reconsideration, maybe there are some cuts which are valid, but we don't know that at this point, and maybe we will know more about it this afternoon.

We will adjourn now and try to do your best to get some figures.

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UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

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NEW YORK ASSOCIATION OF HOMES FOR AGING, INC., et al. :

:

Plaintiffs, :

v. :

PHILIP TOIA, et al., :

Defendants. :

---------------------------------------x

NATHAN KLUGER, et al., :

Plaintiffs, :

v. :

PHILIP TOIA, et al., :

Defendants. :

---------------------------------------x

N. Y. STATE HEALTH FACILITIES ASSN., et al., :

:

Plaintiffs, :

v. :

PHILIP TOIA, et al., :

Defendants. :

---------------------------------------x

76 Civ. 5113
76 Civ. 5233
76 Civ. 5320

Before: THOMAS P. GRIESA, District Judge.

New York, New York
December 17, 1976 - 3:00 p.m.

Appearances:

DAVID J. STERN, Esq., and
JEFFREY A. MISHKIN, Esq.,
Attorneys for N. Y. Association of Homes.

STANLEY LOWELL, Esq.,
Attorney for N. Y. State Health Facilities Assn.

GEORGE C. MANTZOROS, Esq., and
CHARLES A. BRADLEY, Esq.,
Assistant Attorney General,
State of New York.

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THE COURT: We had two helpful meetings this morning with the attorneys, somewhat out of the area, so to speak, and on the record, but I think that I outlined some tentative thinking of mine, and I hope the attorneys have conveyed it, but just to repeat it for the third time:

In the first place, I want it clearly understood that I am not accepting at this time any of the jurisdictional or technical defenses which have been asserted as possible grounds for dismissing these actions. It seems to me, at least for the purposes of a preliminary injunction hearing, at least for present purposes, there are sufficient federal questions to vest the Court with jurisdiction of these actions, so I don't want anyone under the impression that dismissal is a realistic possibility.

Naturally that is the reason we have had all these hearings. If I thought I didn't have jurisdiction, I wouldn't have bothered you and myself with all these hearings.

Secondly, the thing that has come to me, and the people who were present at those meetings heard this stated, but I will, for the benefit of all, restate it, subject to further argument which I would certainly be glad to have to further illuminate the situation, my tentative belief is as follows:

1. That this is a time when both the federal government and the state government are engaged in a process of having Medicaid rates reevaluated. I am saying this in most general terms, but I think it is valid.

What precise formula or rating system will emerge is not yet known. What precise steps should be taken by nursing homes as a whole, or nursing homes individually, to reduce costs or change their pattern of operation also is not really known, at least it isn't known to me at the present time in any case at all. Maybe there will be further submissions on that, but as of the present time some suggestions have been made with respect to particular homes, but these really raise questions which can't be resolved, I don't think, very quickly, and maybe there was a lot of progress this week and I would be glad to hear about that. I don't want to oppose that, but let me just go ahead with a tentative statement.

Regardless of the technical requirements or particular procedural rules, it does seem to me that what we had as of November 1 was a reduction in rates with respect to many, many homes, which was made with little or no notice, and that creates a problem.

Let me put it this way: It may very well be that the pattern of management in the homes individually or as a whole should be changed, but these are things that have to take some time to change, and they cannot be done precipitately without causing some problems.

I think problems undoubtedly were caused by these changes as of November 1. I think it was quite an unfortunate procedure.

At the most I do not really intend to get into the merits of different rating systems, but I am just concerned with this matter of procedure. I understand that these rates will expire by their terms March 31, 1977. I further understand that there is going to be some review,by the federal govenment at least, beginning January 1, 1977, although I don't know how long the federal government review will last, but at lesat the present rates in New York State will expire March 31, 1977.

I think that establishes the boundaries of what we need to talk about on these motions for preliminary injunction.

It seems to me we should talk about either court-ordered relief or agreed-upon relief of an interim nature for the period November 1, 1976 through March 31, 1977.

I think we should consider that from a realistic standpoint. Patterns of operation and really well-thought-out rates cannot be worked out and really won't be worked out until that date of March 31 arrives, or some date occurs in the meantime when new rates are announced.

I have thought about the possibility of dealing with this matter only on the basis of presentation by individual homes of economic emergency. Maybe that is the way to deal with it, but I think that is really impractical, and I think that probably we have to use the instances before us as illustrative, and consider either agreed-upon or court-ordered relief on a broader basis.

I really just tried to summarize the discussions we had this morning, because there are a lot of people here this afternoon who were not present this morning, so I just brought you up to date in a rough way.

Of course, the main purpose of getting together this afternoon is to hear a report of what has happened this week, and I really didn't mean to divert you all away from that, so I think we should now proceed with the real order of business for this afternoon and get a report of what has happened this week.

Who wants to present that?

MR. BRADLEY: If your Honor please, you directed me this morning at 11:45 to have a representative here from the Budget Director's Office.

THE COURT: Right.

MR. BRADLEY: I was able to obtain such a person. Arthur Webb is here. He is in the City also because it is necessary that he appear before Judge Lasker in other matters at 3:45, and I would appreciate, your Honor, if you wish to hear from him that he be permitted to take the stand at this time.

THE COURT: The problem that was presented was, this was a question posed by Mr. Lowell last week and posed again this morning. That is this:

Let us suppose that it becomes apparent that there is a situation that needs to be remedied. We need to get down to brass tacks in terms of dollars. What is it going to cost to effectuate X remedy or Y remedy, and Mr. Lowell went so far last week as to suggest that even if Dr. Cicero and the Health Department recognized certain needs for relief, or changes, their hands might be tied because, in fact, the Budget Director won't make any payments.

I didn't know whether that was a problem or wasn't but Mr. Lowell raised it again this morning and, indeed, said that certain orders that Judge Lasker had made in respect to hospital cases simply hadn't been carried out. Judge Lasker had required the Budget Director's Office to be represented here today, so I thought, well, I just think that if we are going to talk together about this problem we oughtn't to have a big part of the equation missing, so I don't have any need for testimony, I just have a need for the Budget Director's Office to be represented at these hearings from now on, so that all interests are represented and so that if a question comes up it can be answered.

If it isn't answered on the spot, which I wouldn't -- naturally, these things don't get answered on the spot, but at lesat there is someone here who can find out the answer in some way that is appropriate, so I don't really have need for testimony, and I know you are due at Judge Lasker's, but we are certainly grateful for your presence, Mr. Webb, and we will do the best we can.

Okay. Let's go forward.

What happened this week with respect to these consultations?

MR. MANTZOROS: May it please the Court, there is one case we have prepared. As a matter of fact, the staff with Dr. Cicero are prepared, and they have prepared this documentary form, in a form of findings of fact.

THE COURT: Okay.

MR. MANTZOROS: So we have five separate sets here, a set for counsel for the plaintiffs, a set for the Court and a set for the witness, and he probably could give a summary of what those findings of fact are as to each of the five plaintiff homes.

THE COURT: Let's summarize as best we can. Who can summarize it, Dr. Cicero?

MR. MANTZOROS: He has already been sworn.

THE COURT: This courtroom is so clumsy, I think it would be better if you could just -- could you just remain at your table and we will all hear you a little better?

MR. MANTZOROS: Could we have the clerk mark these for identification?

THE COURT: Yes.

MR. MANTZOROS: These will be the documents for defendants' exhibits for identification. They are five separate documents and the two documents at the end are the summary, the highlights, two pages.

Each of the document purports to represent the findings of fact as to each of the five plaintiff homes, your Honor.

May I proceed, your Honor?

FRANK T. CICERO, previously sworn, resumed and testified further as follows:

EXAMINATION

BY MR. MANTZOROS:

Q Dr. Cicero, pursuant to the Court's instructions during this past week, have you and members of your staff met with representatives of the plaintiffs and with their counsel in connection with the various data that the Court instructed you to investigate?

A Yes.

THE WITNESS: Briefly, your Honor.

Monday following our Friday meeting here, the department contacted the five providers mentioned in the suit, brought in our regional survey staff and assigned them with the appropriate central office backup staff.

We held briefing meetings on Tuesday morning and commenced meeting with the five voluntary homes at 10:30 a.m. on December 14. The meetings finished that day and if I might just describe the tone of those meetings in some general terms, at one of the five groups that we met with, there was basically total agreement with the department's position regarding the ability to cut or the ability to make deductions.

THE COURT: Who was that?

THE WITNESS: Loretto Rest Geriatric.

THE COURT: Why don't we start with that one?

THE WITNESS: Certainly. And just so that this is orderly, I have a document. The first page is dated December 16, 1976 and we will call it Defendants' Exhibit X.

THE COURT: Go ahead, Dr. Cicero.

Q Was this exhibit prepared under your direction?

THE COURT: We don't worry about the authenticity.

Now, what was the agreement?

THE WITNESS: Your Honor, we reviewed with the -- and I believe you have this exhibit before you -- we reviewed with the Loretto Geriatric people who attended the meeting, a very congenial atmosphere, I might add, was reported to me.

THE COURT: Who did that review? Who was present at that?

THE WITNESS: In the exhibit, your Honor, you will find who was present at the various -- both by department staff and the facility.

It is the start of the worksheets after the findings of fact.

THE COURT: I see. Fine. Thank you.

THE WITNESS: In any event, we went through with each of the areas and, basically, there was very little disagreement between us and the home.

One of the requests made by the home was that in certain areas, if they had some difficulty, if they cyould make it up by effectuating other economies, would that be acceptable short of a transfer, and we said of course it would.

The loss, if you look on the second page of the findings of fact -- it would be the fourth page in -- the dollar loss, estimated dollar loss there claimed by the facility is about $793,000. We came up with proposed reductions of $907,000, your Honor.

As I mentioned, these reductions were accepted by the facility.

I would like at this point, your Honor, to mention something else, because I think it goes to the heart of the question of the role of the Budget Director and the Commissioner of Health and the rate appeal item that we discussed last time.

This home presented to us their contention that they indeed required -- and if you look on the first page of that exhibit, item number 3, that they indeed required for their patients more nursing, bedside nursing care hours, if you will, than our current rating ceiling would allow.

I don't know what the answer to that is. I don't know if they do or do not.

THE COURT: I am not with you now. You are talking about the cover sheet?

THE WITNESS: The cover sheet.

THE COURT: And you are talking about item 3?

THE WITNESS: Yes, sir.

THE COURT: Let me read that.

THE WITNESS: Fine.

(Pause)

THE COURT: Okay, I have read it.

THE WITNESS: Okay, your Honor.

The point I want to make is, although we have identified cuts if made by the facility would reduce their dollar loss to the amount that would be necessary for them to survive on the rate that we established as of November 1, and although they agreed to it, to us, there still remains this issue, the patient mix issue, and what I really want to highlight here is that we are prepared to go into this facility, and if their claims are correct, there will ge a rated adjustment upward, and it will be approved by the Commissioner and certified by the Director of the Budget.

THE COURT: I am not clear.

You are saying that they have agreed to certain cost reductions?

THE WITNESS: Yes, sir.

THE COURT: But are you saying they still request a higher rate than the rates put into effect, what we call the new rates? Are they still requesting something higher than the new rate?

THE WITNESS: What they are saying is, in the nursing area, in which of course there was this 60-percent ceiling, their patients actually require a higher amount of nursing care than the ceiling would have allowed in a dollar expenditure relationship.

They are saying their patients really need that, and what we are saying to them is, if that is true, we will give you the cost that you have and whatever that works out in relation to the overall per diem rate, that is the way it will be.

Sure, if they cut further in other areas without jeopardizing their good state, it may or may not have --

THE COURT: I am sorry. I somehow don't get this, because at one point, and I am talking about the second page of the findings of fact, item 4 of the summary says, "Facility agrees total cuts" --

THE WITNESS: Right.

THE COURT: -- "However, wishes to live within rate with their own adjustments and cuts."

I would read that to mean that they accept the rate now applied, and I think you indicated there was some amendment last week, but I am talking about whatever rates you gave last week as being the current rate for Loretto, I would read your findings of fact as stating they were willing to live within that.

THE WITNESS: That's correct, your Honor.

THE COURT: But you have this item 3 on the cover page and you have tried to explain that to me, but let me see if I can summarize it.

Are you saying that, although they are willing to live within the current rate, they wish to submit to you information about the need for more nursing, and you are willing to consider whether the current rate should be raised because of the need for more nursing than your rate allows?

THE WITNESS: As a conceptual matter, that is exactly what I am trying to get at, your Honor.

THE COURT: So there is an agreement that, yes, if they have to, yes, they will live within the current rate, but there is an agreement on your part to consider adjusting it for nursing needs?

THE WITNESS: Absolutely, sir. And I wanted that point to get across.

THE COURT: Who represents Loretto?

Is that an accurate statement, because that is about as much agreement as anything human beings can reach.

MR. STERN: Decidedly not, your Honor.

THE COURT: It isn't?

MR. STERN: No.

Loretto advises us, and I think that Dr. Cicero agrees with us, that there were a number of suggested cuts made by the Department of Health on Tuesday relating to a variety of factors, including nursing, and Loretto, which is in dire need to cash to stay in existence, returned to Syracuse and on Wednesday fired 26 of their staff, including the psychiatrist, that the Department of Health representative said was too much, including several other people who had previously been approved by the Department of Health, but Loretto could no longer wait and it terminated those people effective immediately.

With respect to the nursing care, your Honor, the meeting between Loretto and the Department of Health resulted in agreement that Loretto needed the nursing care that it was providing to the patients, and that its rate was $2.36 too low for it to continue providing the current level of nursing that it is presently providing, so that even after Loretto went back and fired the people, there is a disparity of $2.36 between the rate that the new rate represents and the costs of Loretto to deliver the nursing services which it has presently delivered, and it has not, and it finds itself really unable to fire nurses on the spot to effectuate the same services.

THE COURT: Who has been fired? You gave me a number and I should have taken it down. How many people have been fired?

MR. STERN: We were advised by the administrator of Loretto by telephone that he has fired 26 personnel, including the psychiatrist.

Indeed, I think Dr. Cicero can tell you who was fired because it complied with whatever the recommendation was of the Department of Health outside of nursing; Loretto decided that it would just fire them so that it could impress upon the Department of Health what it was doing, and even doing everything, it still fell $2.36 short.

THE COURT: Can you just get more specific? How many employees -- before the firing, how many employees of all kinds did Loretto have? Just approximately. Was it 100 or 150?

Is anybody here from Loretto?

MR. STERN: No, your Honor, we did not expect to have witnesses.

THE COURT: I am not expecting that, but I don't know what the 26 represents. I don't know what relation that bears to the whole staff.

Is it firing half the staff?

MR. STERN: No, your Honor.

MR.MANTZOROS: Dr. Cicero has that.

THE COURT: Are you aware of the firing, Dr.

Cicero?

THE WITNESS: He represented Loretto and I didn't want to interject myself.

THE COURT: Yes.

THE WITNESS: But we do have a letter, your Honor, from Mr. Harper, who is the executive vice president to Dr. Furth, who is our assistant regional health director in Syracuse.

THE COURT: Was that part of the exhibit?

THE WITNESS: I am not sure if you have it in your exhibit or not, your Honor.

THE COURT: I don't.

THE WITNESS: It is dated December 15, 1976.

We would be certainly happy to enter this, in which, and I think, as you recall, your Honor, the reason I brought Loretto Rest up is because of the kind of meeting we had with them. They didn't go around firing people to impress it upon us. They went around and agreed with us in every issue except,primarily, nursing care.

I say it wasn't presented properly. We agreed with them on nursing care we will look at it and they will get the rate appeal and that is what I said.

THE COURT: What does the letter from the man say?

THE WITNESS: He outlines --

THE COURT: Why don't we have that marked as an exhibit?

THE WITNESS: Certainly, sir. Certainly.

THE COURT: Call that X-1.

MR. BRADLEY: May Mr. Webb be permitted to go to Judge Lasker's courtroom?

THE COURT: Mr. Webb.

MR. WEBB: Yes, your Honor.

THE COURT: Has anybody figured out those costs that I asked you for, Mr. Mantzoros?

MR. MANTZOROS: I don't think so, your Honor. I gave him the proposition about ten minutes before we started.

THE COURT: Let's suppose that in some way it was necessary -- just pick a figure out of thin air and this isn't a good way to deal with it, but I haven't had figures.

Let's suppose that it were necessary, in order to keep some nursing homes alive during the next five months or so, to pump $500,000 into those nursing homes. Is there any reason why the State could not pay that money?

MR. WEBB: It is dependent upon -- and I am assuming this is for the record, your Honor --

THE COURT: Yes. It is a very poor question to ask you, but as long as you have to run away and I may not see you again tonight, why -- you see what happened last week. As I said, Dr. Cicero indicated that there would be a willingness to consider on an individual basis certain homes as to the bona fides of their needs, and indeed now there is a consideration as to whether there should be an increase in the rate of Loretto.

Even with the firing and all, you have heard that; right?

MR. WEBB: I would concur because it is part of the process.

THE COURT: It is conceivable that it might be necessary, either through an agreement or through a Court order, to do a number of different things. I don't know the amounts of money involved, but are we going to end up, let's say, with an agreement by the Department of Health that Loretto Home needs X more dollars per day because of nursing needs, and then we turn to the Budget Director and they find out they won't issue the check? We are not going to run into that, are we?

MR. WEBB: Your Honor, the appeal process is part of our normal rate mechanism. The appeal process which Dr. Cicero has pointed to is absolutely part of our appeal mechanism.

We rely upon the Department of Health for, in the first instance, their analysis both in quality of care point of view as well as some cost impact. That rate is, as you know, submitted to us for our approval. If it is a legitimate appeal based upon the analysis of the Department of Health, that is part of our rate system and rate approval system.

I concur with that in this particular case.

THE COURT: And the money will be paid, right?

MR. WEBB: That is true. We do not, as you know, sir, we do not pay from the Budget Division. That rate is returned to the Department of Health, submitted to Department of Social Services and submitted to the local district within which that particular home resides.

THE COURT: But there isn't any attitude on the part of the Budget Director now to simply frustrate any and all increases?

MR. WEBB: According to the state law he is required to sign off on those rates which have been based upon a legitimate appeal and he is not, as you suspect, your Honor, not interested in frustrating any legitimate appeal process.

MR. LOWELL: If your Honor please, may I have a word with respect to that? Because it was my issue that was raised.

THE COURT: Yes.

MR. LOWELL: Mr. Webb, at the meeting which took place with respect to the four proprietaries, with respect to at least two of them, there was an indication on the part of the State Health Department officials, and probably in the report that Dr. Cicero has this morning, that as a result of that analysis which the judge had instructed, certain mistakes had been made in the computations amounting, for example, in one instance, Flushing Manor Nursing Home, to over $2.00 per day, and when the administrator said, "When will this mistake on your part be reflected in my rate?", the response was "Not before April 1977."

Is that the position of the Budget Director and the Health Department as it was expressed and which Mr. Benenson testified to here under oath, or will that be done promptly?

MR. WEBB: Sir, I am sorry. I am not prepared to answer your question because, one, I am not familiar with all the particular individual nursing homes that you might have pointed out.

THE COURT: Wait a minute. I think you have to go up to Judge Lasker's and the trouble is we haven't gotten deep enough into this to really ask you an intelligent question, but I think what you said was that in the normal course of events, if the Health Department approves an increase in the rate for a particular home, and let's take Loretto as a possibility, they are discussing right now, or will discuss shortly, the possibility that Loretto should have an increased rate because of this nursing requirement; right? Okay.

Now, if the Department of Health approves an increased rate,from what you said this goes over to the Budget Director for his approval; right?

MR. WEBB: That's correct.

THE COURT: Let's suppose this occurred. What would be the considerations required for his approval?

MR. WEBB: Okay.

Very briefly, if I may, your Honor, try to describe what the Budget Director would do. He is required by law under Section 2807.3 of the State Public Health Law, he is required by that section to in fact certify those rates of payment and in that certification he reviews the Department of Health's preparation of material, both the administrative process that the Department of Health go through in terms of developing what the appeal is based upon, as well as the potential cost impact of that particular rate increase.

We then make our recommendation to the Budget Director who then makes his decision and certifies that rate and returns it back to the Department of Health.

THE COURT: So, if we were just dealing in the normal course, he might or might ot certify it; is that right?

MR. WEBB: That is always an option.

THE COURT: We are not quite in the context of a normal procedure. I mean, Dr. Cicero and his people have acted very quickly this week, as they said they would do when they were in court last Friday, and I am sure they have really made every conceivable effort to throw people into this and expedite their consideration and so forth.

I don't know all the results of that because we are just starting to talk. The point I'm at is if things can be resolved by agreement, I don't know if that's possible, if things can be solved by agreement, that reduces the amount of consideration I have to devote to this matter. You understand that.

Now, if the Budget Director is part of the process that has to reach agreement, I want somebody from the Budget Director here to go along with these discussions, so we don't have the Budget Director sitting aside representing a process that may or may not coincide.

I don't even know how to express it, but we do have an action in this court. Everybody is working fairly hard in trying to move it along as best we can, and apparently we discover that a pretty important cog in this machinery is the Budget Director, and the Budget Director has not been represented heretofore, and I don't see why the Budget Director should not -- if the Budget Director has any problems about these things, just mention them right away and sit here with us, and I think you should have a representative at every hearing.

I think you should be in continual consultation with Dr. Cicero and find out what is going on because if there is going to be approval or disapproval we want to know it right away, and I have to assume, unless I hear it further, and I am going to let you know right now that I expect you to keep up with what Dr. Cicero is doing, what he recommends and every phase of this action, and if at any point you are objecting, let me put it this way.

I will assume that Dr. Cicero's positions are acquiesced in and agreed to by the Budget Director unless I hear to the contrary.

MR. WEBB: May I consult, please?

THE COURT: Yes.

MR. WEBB: Thank you.

(Pause)

MR. WEBB: If I may, your Honor, as I mentioned to Mr. Bradley walking over here, one, I am not completely familiar with all the intricacies of this caes, but I did make a commitment to Mr. Bradley, who is going to brief you, your Honor, that the Budget Division is fully in agreement and will commit the necessary resources to in fact participate with you, your Honor, from the bench in the agreements or disagreements, whatever happens, that are ruled from the bench.

THE COURT: Okay.

MR. WEBB: If I may, this is a technicality which my -- I am trying to get some counsel here.

I am not under oath; is that correct?

I don't know what that means, but I just want to make sure, because I am comitting the Budget Director at this point in time, obviously I am committing resources for the Budget Director at this time, and we are prepared to do that at this time, and I am not prepared to, though, accept if I understood your question to be, or direct order to acquiesce in any finding that the Department of Health makes.

THE COURT: No, nobody expects anybody to write a blank check at the present moment.

All I am saying is this, and I think this is what you have just stated. Maybe I am carrying it a little farther, but here is what I am saying. I don't want to have to have a court proceeding and deal with the Department of Health at length, and then start in a new series of problems with the Budget Director.

I just am going to insist on this, and I want this very, very clear: The Budget Director is welcome to have a representative at these hearings if it wishes, or if it feels it is unnecessary it doesn't have to have a representative. That is up to the Budget Director.

But I will say this: It will be the responsibility of the Budget Director in some way to follow these proceedings carefully and follow Dr. Cicero's positions and the Health Department's positions, so that I will assume that any position taken by the Department of Health is acquiesced in by the Budget

Director unless I hear immediately to the contrary.

That doesn't mean you are now writing a blank check; it simply means that if, at any point, Dr. Cicero takes a position you don't agree with, I don't want to find out three weeks later. I want to know right at the time. And I mean when Dr. Cicero stands up and takes a position, I am assuming that represents both the Department of Health and the Budget Director, unless you are here and contradicting it right away.

That is the necessities of timing in my case, so you don't need to write a blank check and voucher for everything in advance, but you need to follow this so that I can hear the State through one spokesman and don't have to deal with two, so that is my position.

MR. WEBB: Your Honor, what we are ready to present to Judge Lasker, and I would assume that it wouldn't be inconsistent for me to present to the same federal court, the position we would take there is a quote from Mr. Goldmark. He is more than willing, he is prepared to work to whatever length to fully understand and to work with the departments involved in these particular cases, both hospitals and others, so that he is fully briefed so he fully understands these cases.

He knows the fiscal impact of these cases and will comply with whatever ruling that comes from the bench.

THE COURT: Fine.

MR. WEBB: If I may continue, your Honor.

If I interpret you correctly, and I don't necessary like to reinterpret your ruling, but I want to fully understand, if we are prepared to set up a method, a procedure whereby we are fully cognizant of what the Department of Health is doing, that is acceptable.

THE COURT: That is ideal. That is exactly what I am driving at.

MR. WEBB: And, furthermore, in this methodology we are assuming that the rate-making process will continue as we would normally continue, and that every case, every rate appeal or adjustment involved for these litigants will not have to come before the Court.

THE COURT: You are getting way beyond. I don't know.

What I said is down in black and white. I don't think I need to repeat it.

As long as there is a court proceeding, I would expect to be able to deal with Dr. Cicero and have him be the voice of the State, both for the Budget Director and the Department of Health as far as this Court is concerned, unless you are with him and contradict him right there and then, and that means that you can be here at every minute that we are having a hearing, but if you are fully in agreement, then you don't have to be here.

There is no reason to have a bunch of people here if you are simply of one mind.

But I am saying this for the umpteenth time: I don't want to have to deal with Dr. Cicero one day and three weeks later deal with the Budget Director's office.

MR. WEBB: Agreed.

THE COURT: Let's terminate this. You get my point, I am sure, and you go on up to Judge Lasker and take care of him.

MR. WEBB: Thank you.

THE COURT: Let's go ahead.

MR. STERN: I think that we might possibly be able to shortcut this by my calling to your attention page 3 of the letter that was submitted to you.

THE COURT: I haven't read the letter.

MR. STERN: Indicating that with all the cuts that Loretto has accomplished at the suggestion of the Department of Health, it finds it is essentially, at its prsent rate facing a loss of $760,000.

THE COURT: Let me just take a look at the letter, please.

MR. STERN: Surely. That is on page 3.

(Pause)

THE COURT: Taken away the option of selecting the desired entree and dessert; annual saving, zero.

Aren't you going to let him -- if it doesn't cost any money, why don't you let them have the option of the entree?

THE WITNESS: Your Honor, let me explain that to you.

THE COURT: Don't, please.

THE WITNESS: You don't want to know about the twenty waitresses there with the selective menus that you would find in no other place in New York State at Loretto Rest, and they agreed to get rid of those waitresses?

THE COURT: I failed to inject a note of levity. I am not requesting that, please.

Dr. Cicero, beginning at the bottom of page 2, I just don't understand this, and I would like to go through it point by point.

THE WITNESS: Yes, sir.

THE COURT: It says, "Our major problem remains in the area of nursing. The present good state ceiling authorizes a nursing cost per day of $16.10, or per year of $126,000. This authorization will buy 2.79 nursing hours per patient day. The present Loretto staffing pattern is 3.2 nursing hours per patient day for a per diem of $18.46 or per annum of $1,176,000."

Why is there a difference between $126,000 and $1,176,000?

THE WITNESS: I see that, your Honor. I guess we would have to subpoena Mr. Harper to explain that because I can't understand that, either.

The difference is $2 --

THE COURT: You think it is just an error?

THE WITNESS: Yes, I do, a computation error here.

THE COURT: 126 may be wrong? It may be 800 or -- does anybody have the figures?

THE WITNESS: I think the substantive difference, your Honor, is the 1610 versus the 1846.

I think we can use those two figures.

MR. LOWELL: That is the per diem figure.

THE COURT: Well, let's use that and I think if somebody can get a correction --

MR. MANTZOROS: Mrs. Wall has it.

THE COURT: Do you have the figure?

MS. WALL: Yes, 1026037. They left out a zero.

THE COURT: I will just make the correction on my copy. This is the exhibit subject to check.

Now let's go on.

If Loretto was asked to maintain staffing at this 3.2 level, an exemption from the ceiling of $2.36 per diem, or 150,630 per annum must be granted.

Where do those figures come from?

THE WITNESS: What he is saying, your Honor, is that the difference between 1,026,000 and 1,176,000 is $150,000. In other words, he says that he needs enough dollars to staff that.

THE COURT: I see.

THE WITNESS: And that may be correct. That I why I want to highlight it, because I think it is a very significant point.

THE COURT: That is the arithmetic, right.

THE WITNESS: Yes, your Honor.

THE COURT: All right. Now, let me just go on.

(Pause)

THE COURT: I must say, Mr. Stern, that I have two things that seem to support an agreement on the part of Loretto except in the area of nursing care.
I have a representation by Dr. Cicero, and I have a letter by Norman Harper.

I really find this troubling if we are going to have to get into a dispute of fact as to whether Mr. Harper really means what he says in his letter.

MR. STERN: Your Honor, as I said to you, certain suggestions were made to Mr. Harper at the meeting on Tuesday, and Mr. Harper, with whom we just spoke on the phone before I came down here, said he has adopted the suggestions. It changes the character of his institution, but he has mortgage payments to meet and he is adopting the suggestions, period.

THE COURT: That is the end of it as far as I am concerned.

MR. STERN: But having adopted those suggestions outside of the area of nursing, his present rate is still inadequate to provide everything else.

THE COURT: But what we are trying to get, there is no argument between you and Dr. Cicero now.
Dr. Cicero acknowledges that Mr. Harper takes the position that the rate is still inadequate.

MR. STERN: Then, for purposes of the Loretto Home, we can move on then, your Honor; I will agree with that.

THE COURT: I think this illustrates that I was probably very much premature in all that I said this morning. Let's just take the Loretto Home.

If the Loretto Home is at all typical, let me put it this way. If there are other institutions that are like the Loretto Home, I would not be warranted in granting any injunctive relief because cuts have been agreed on in the nonnursing side; the cuts are documented; they are not protested. And as far as the nursing side, there is a willingness to promptly try to come to a determination on whether there is a bona fide claim for nursing.

You can't tell me that I would be warranted in ordering the return to the old pre-November 1 rates for Loretto Home.

MR. STERN: Your Honor, may it please the Court, I said that they undertook to make the cuts and I don't dispute the facts that the cuts have been made. I can have Mr. Harper down here first thing in the morning to explain why he accepted it, so that he can move on to nursing, which really affected his patient care.

He doesn't agree that he had too many people at these amounts. He walked into the meeting and the Department of Health said, "Look, we recommend that you do this and this and this," and he said, "I disagree."

They say they disagree, too. There is an ultimate -- they don't agree on what he should do.

THE COURT: Were you there?

MR. STERN: I am closer to the events than Dr. Cicero is because I walked into the meeting, your Honor.

THE COURT: I wish Mr. Harper were here.

MR. STERN: I asked your Honor whether we should have our witnesses in court and I was not --

THE COURT: I am not criticizing you. I did not know these issues were going to come up and we can do it very quickly. This is really a silly pass because --

MR. STERN: Can we move on to another home?

THE COURT: No, this is important, to see what this illustrates.

MR. STERN: From Mr. Harper's point of view it illustrated that if he accepted every one of the areas where the Department of Health disagreed with him he still needed his old rate, basically, to continue to deliver those services which he had not cut out at the suggestion of the Department of Health.

THE COURT: We are saying the same thing, but as far as the cost savings that he was able to effectuate, if he felt that he could not conscientiously discharge all those people without harming his operation, he should not have fired them and he should have said, "I've got a lawyer down in New York and there is a judge in New York, and if he doesn't agree with us there is a court of appeals," and he should have stuck to his guns, so I must tell you that I must presume, until I hear very convincing testimony to the contrary, that these cuts that are listed in Exhibit X-1 can be made and have been made without detriment to the institution, and that the open issue, as far as the amount needed for nursing is under consideration by the Department of Health.

When are you going to consider it and when are you going to decide, Dr. Cicero?

THE WITNESS: We will go into that home next week, your Honor.

THE COURT: Now let's move on from Loretto.

MR. STERN: Your Honor, I would respectfully like to make a statement.

Mr. Harper has had a lawyer in New York since

November 16 when the complaint was filed.

He is now under the threat that this check tomorrow or in very short order from Syracuse is going to be at the new rate because, despite his having an attorney in New York who has been pleading this case now for a month, it hadn't happened, and he has patients to care for up in Syracuse, and nothing that I can say to him can convince him, in light of what I have been able to do for him in the last month, that he shouldn't make cuts in order to keep his institution open, because he felt that his first duty was to his patients.

So, for you to indicate to him and to me that somehow he should have come in here and said the same thing that we have been saying since November 16 is somewhat unfair.

THE COURT: Well, I am saying it.

Okay. Next home.

MR. LOWELL: If your Honor please, is it possible that we can intersperse some of the facilities cases? We have three of the people here.

THE COURT: All right. Fine.

MR. LOWELL: I think that within about fifteen minutes we can take all three of them.

THE COURT: Why don't we do that.

Mr. Benenson, will you get up on the stand and be sworn? Flushing Manor.

I think it would be better if you would -- can't he just stand and present what he has to present?

MICHAEL BENENSON, was duly sworn by the Court.

THE COURT: What is your name?

THE WITNESS: Michael Benenson.

EXAMINATION

BY MR. LOWELL:

Q Mr. Benenson, what is your position at Flushing Manor?

A I am the administrator.

Q Keep your voice up, please.

Would you tell the Court, please, whether you attended a meeting at the State Health Department on Thursday pursuant to the Court's direction and at the request of the Department of Health?

A Yes, I did.

Q What time did you get there?

A 9:35.

Q Did you go to the room?

A Yes, the room was changed.

Q Who was present?

A Mr. Lopez, the accountant for Flushing Manor Nursing Home, a CPA, myself, Steve Steinhart, an attorney for the State Department of Health, Regina Malone from the New York State Health Department, Dr. Nazary Michelin from the New York State Health Department, Laurie Turner from the New York State Health Department, Robert Malachy from the New York State Health Department, Ann Lee from the New York State Health Department, Bernadette Bayer from the New York State Health Department.

THE COURT: Are there findings of fact on this?

THE WITNESS: Yes, your Honor.

THE COURT: Why don't we leave those?

MR. LOWELL: He can report on what was said and done in a very few minutes, if your Honor please.

THE COURT: I would like to have the findings of fact.

THE WITNESS: Yes, your Honor.

Plus, your Honor, we have computed another sheet that I think you would find helpful. It delineates all the nine proprietary facilities and what the basic issues are in each of those. Perhaps we can get that to the Court.

THE COURT: I don't know where we are in

exhibits, but let's call these --

MR. LOWELL: Facilities' No. 1.

xxx (Facilities' Exhibit No. 1 was marked for identification.)

Q Mr. Benenson, what was your old rate?

A $6.46.

Q What is your new rate?

A $40.61.

Q $40.61?

A Yes.

Q On the basis of that, what is the computation that your accountant and you have made on a twelve-month basis beginning January 1, 1976 through December 31, 1976 with respect to loss?

A $16,000 loss.

Q Do you have any private patients?

A Yes, we do.

Q Does that $416,000 loss include the profitable private patients?

A That's true.

Q Without the private patients, have you computed what your Medicaid loss would be for Medicaid patients?

A Yes. Approximately $486,000.

Q Mr. Benenson, is yours a good State facility?

A Yes, it is.

Q Does it have any very goods?

A Yes, it does.

Q In what?

A In building.

Q That's structural?

A Structural, yes.

Q You appeared on Thursday morning.

Would you tell the Court as briefly as possible what took place?

A The meeting was chaired by the attorney, Mr. Steinhart, and he stated that the department was prepared to recommend $44,000 in savings to me.

Q Just a moment.

$44,000?

A Yes, sir.

Q Was that the total amount of the savings?

A No, the total amount of the savings turned out to be $42,825.

Q At the outset he said $44,000; is that correct?

A Yes, sir.

Q It turned out later to be $42,000?

A Yes, sir.

Q And you have testified that your Medicaid loss on an annual basis was what?

A $486,000.

Q Did he specify what this $42,000 would be?

A Where it would come from?

Q Yes.

A Yes, he did.

Q Would you tell us what he said and what you said?

A He chaired the meeting ane he also said at the outset that the department had found that they needed to make a correction. He refused to admit that they made an error in the computation of our rate.

This error amounted to approximately 28¢ which would generate an additional $152,000 to the facility for the year. This would reduce our projected loss from $486,000 down to $333,000.

Those were my numbers. He didn't have the figures.

Q Mr. Benenson, did he tell you when that correction would be made by the department?

A I asked him and he referred it to the people who were sitting in the room from reimbursement, and that gentleman's exact words were, "I can do the calculation in ten seconds, but it will take a couple of months to get it through the Budget Department."

I said, "What are you talking about, in a couple of months? I have heard it is three or four months."

He said, "You are probably right."

THE COURT: Do you have financial statements?

THE WITNESS: Yes, sir, they have been submitted already.

The $42,000 in cuts, the attorney chairing the meeting referred each section of it to the appropriate department within the Department of Health.

Q Who was present?

A Who was present? Dr. Nazary Michelin reviewed administration and general costs.

Q What did he say?

A He said our staffing pattern was acceptable, quote, and that we should make -- the only area that they could find where it was out of line was in the area of the office manager who was getting paid too much money, they thought $20,000 was too high, and that we should cut her salary by $5,000, and this would generate a $6,000 saving.

Q Using the projection factor?

A Yes, sir.

Q What did you respond to that?

A I said in essence we had already done this. We had in essence reduced the cost factor for that particular item about $8,000 because in January when we were advised of a rate freeze we went on an economy move and rebudgeted the entire facility so that that savings had already been accomplished as of the first of the year.

Q And the losses which you testified to a few moments ago have already been taken into account, plus the extra $2,000?

A Yes, sir.

Q What was the next item?

A Nursing.

Q Could you tell the Court --

THE COURT: Why do we have the speeches from the lawyer? Why don't you interrogate the witness?

MR. LOWELL: I am sorry.

THE COURT: I know nursing is important.

Let's go back tothe loss. The loss you say, is it an annual loss projected for the year? What is the loss?

THE WITNESS: The annual loss projected is $416,000 as shown in the statement. There is an additional loss due to Medicaid.

THE COURT: Let's see the statement.

Flushing Manor Nursing Home, prepared by Mark,Miller, Weber & Lopez.

MR. LOWELL: We submitted that, your Honor.

THE COURT: Why don't you show me what you are referring to? If I have it here, I will get to it more quickly.

We don't have that.

THE WITNESS: I happen to have an extra Xerox copy of it, your Honor, but I know I submitted originals.

MR. LOWELL: We submitted all of those to the State Department.

THE COURT: But you didn't submit them to me.

I will tell you what I have got is the affidavit of Michael J. Benenson dated December 10, 1976, and I have a financial statement as of June 30, 1976 unaudited.

If you gave us the full year 1976 and somehow we missed it, I am sorry.

THE WITNESS: Those are projections for the full year.

The last statement that was prepared was the June 30 statement. That was restated by the accountants as they have to, and there is a disclaimer on the front of that statement which they have to put on a statement when an event subsequent to the issuance of the statement directly affects it, according to accounting procedures, and the statements reads "September 3, 1976 except to the provisions in allowance for adjusted Medicaid" --

THE COURT: I don't need that yet. I just need to have the document that you are referring to which I haven't heretofore had.

THE WITNESS: I just gave your clerk a Xerox copy of it.

Here is a complete copy, your Honor.

THE COURT: I have a complete copy.

We will mark this Facilities'Exhibit 2. Plaintiffs' Exhibit 2.

MR. LOWELL: Do you want to ask him a question, sir?

THE COURT: Just a minute. Let me see the document.

The $416,000 projected operating loss for the year that is based on, obviously, the rates as adjusted November 1; right?

THE WITNESS: Yes, sir.

That does not take into account, your Honor, the correction that the Health Department informed me of yesterday.

THE COURT: That is a correction which would --

THE WITNESS: I calculate it out as $152,000 which would reduce the loss.

THE COURT: Would reduce it to what?

THE WITNESS: Well, if you want to figure it on a Medicaid basis, it would reduce the loss to $333,998 loss because in that loss is a profit from the private patients in excess of $70,000.

In other words, even at the old rate, we were losing 97¢ a patient day on the Medicaid patients, which was being made up by the private patients. They were subsidizing, in essence, the Medicaid patients.

THE COURT: If your projected loss is $418,000 and you have a correction of 115, can't I just subtract 152, can't I subtract 152 from 416?

THE WITNESS: Yes, you can.

THE COURT: And that gives me --

THE WITNESS: 263,607.

THE COURT: Of course; right.

Now, in order to arrive at a cash loss, we take out $180,000?

THE WITNESS: Correct. And you add back $75,000 for amortization of the mortgage payments.

THE COURT: So we take out 180 from the 263 and that gives 83,000.

THE WITNESS: The bottom line comes to 158 --

THE COURT: Why do you add amounts back in?

THE WITNESS: Well, the amortization is not a P & L item, your Honor; it is a cash flow item.

THE COURT: It wasn't in your 416, was it?

THE WITNESS: No, because the 416 is a P & L figure.

THE COURT: Why don't we compare apples to apples? You weren't bringing out the amortization before, were you?

MR. LOWELL: Yes, your Honor. That is very much a part of the case. He has to pay his bank amortization and interest.

THE COURT: Did you mention it earlier?

THE WITNESS: Yes.

MR. LOWELL: That is the basis.

THE WITNESS: If you look at my affidavit or the papers we submitted, it is in there.

THE COURT: All right.

I don't see anything about amortization.

MR. LOWELL: Judge, may I, if your Honor please, the problem he has is that he must pay the bank. He doesn't pay the bank only the interest; he pays the bank the interest and the amortization, I assume, on a constant payment basis, and what he gets in a statement from his accountant with respect to his balance sheet the accountant does not under a P & L statement take into account the amortization, because that is not part of the balance sheet in those terms, but in realistic dollars cash flow basis, the money he has to pay the bank is money which he receives from the Medicaid payment, and part of our case, if your Honor please, the fourth major cause of action deals with the change in the real property reimbursement which reduces the amount --

THE COURT: What is the amortization?

THE WITNESS: $75,000 a year.

Can I make one slight correction? Amortization is not part of a P & L which is a portion of the financial statements, but amortization is part of the balance sheet which represents the financial condition of the facility.

THE COURT: You say it is part of your cash flow?

THE WITNESS: That's right, and it appears on the balance sheet as a reduction in the liability.

THE COURT: All right.

You are saying that -- what is your current cash flow situation?

THE WITNESS: My current cash flow situation is that, hopefully --

MR. LOWELL: You mean with the correction, your Honor, or without it?

THE COURT: Well, you have to take into account --

THE WITNESS: Assuming I could survive until they corrected the rate the three or four months, my cash flow position for the year 1976 would be that I have a net deficit of $158,000 worth of cash flow, dollars going out of $158,000.

THE COURT: If there is a correction, how quickly can that be made, a correction for the Flushing Home?

THE WITNESS: We will go to the Budget. We are ready to go right away.

MR. CICERO: We will inform the Budget Director of your desire and it will be done within a week to two weeks.

THE COURT: That will be accelerated. I think we can at least insist on that.

THE WITNESS: Fine. I appreciate that.

Do you want the remainder of the savings?

MR. LOWELL: They came up with some other suggestions.

THE COURT: The 42 you are saying, this was unrealistic.

THE WITNESS: I am not saying it was unrealistic. What I am saying is that several of them were realistic and in fact had been implemented much, much earlier in the year than this date; some in terms of January, some in terms of March, and they are reflected --

THE COURT: By you?

THE WITNESS: -- in these statements that you have.

THE COURT: What savings did they come up with that you had not already implemented? Any?

THE WITNESS: The elimination of the consultant activity, the master in therapeutic recreation consultant.

The amounts to $5,676 by their figure.

Also, a full implementation in the reduction of nursing --

THE COURT: Is this anywhere in any document?

THE WITNESS: I imagine it is in their findings of fact.

THE COURT: Is it in the findings of fact?

THE WITNESS: I haven't contributed to that, so I can't tell you.

THE COURT: But, anyway, let's give your version. The savings of about $5,700 --

THE WITNESS: In round numbers, yes, sir.

THE COURT: For what was that?

THE WITNESS: The firing of the master in therapeutic recreation.

MR. LOWELL: There is a difference in salary between someone who has a master's and someone who doesn't.

THE WITNESS: An additional savings which is not fully reflected in the statement would be a reduction in the hours of service we provide in the activities program.

THE COURT: This is an annual saving?

THE WITNESS: Yes, sir.

THE COURT: Commencing whenever you would do it.

All right.

MR. LOWELL: Of how much?

THE COURT: He said $5,700.

Any others?

THE WITNESS: Yes. They recommend a reduction in the hours of recreation service provided to patients from 166 down to 114. We had reduced the 166 approximately to 130 already, so that we get a net effect there of a saving of 16 hours, which I imagine would be approximately half of the 13,700 that they projected would be saved.

THE COURT: Let's call it 6,000.

All right. What else?

THE WITNESS: They said we were paying one of our social workers who has a bachelor's in social work too much money and we should cut her salary by $4,800, plus fringes, which came up to $5,200.

THE COURT: That was a salary for whom?

THE WITNESS: A social worker.

They also said that we should reduce our total nursing staff in the nurses aide category by one person per day, and I told them that that is one of the items which we had much earlier in the year implemented.

THE COURT: Let's just talk about new items.

THE WITNESS: The only new item then, your Honor, would be the consultant -- 100 percent new item would be the consultant with the master's in therapeutic recreation for $5,700.

THE COURT: You said there was a further

reduction in recreation and the salary of a social worker; those are all new items.

The social worker has already been reduced.

THE COURT: So that isn't a new item?

THE WITNESS: No, sir.

THE COURT: So I have $5,700 and $6,000, or $11,000 on an annual basis; right?

THE WITNESS: On an annual budget, your Honor, of in excess of $3 million.

Q What did they say about your nursing services in terms of caliber?

A The representatives of the Department of Health were very flattering to the facility and congratulated us on the quality of care in nursing and social services and recreation, and in general about the facility.

We have been recently served, after many of these cuts were instituted and they could actually see how we were maintaining services;although not at the level we would desire, it is still more than an acceptable level.

THE COURT: Do you have any comments on that, Doctor?

What about the Flushing Home?

DR. CICERO: I do have a few comments, your

Honor.

We calculate as part of the cost that you are including as a loss $102,000 which we put into the program deficit related to nonallowable program costs in the Medicaid program.

Could you tell us what those areas were, nonallowable? Were they related, for instance, to your doing business with any companies that might be related to you in any way?

THE WITNESS: I have in front of me, and if the Court would like, I have a copy for them of the sheet called the HE-12, which is a form used to compute our rate.

This has all the disallowances that the Department makes on desk audit, not field audit when they come in with a full-blown staff, but on desk audit from our form HE-2.

Our facility, unlike many others, has been audited currently for 1970, '71, '72, '73 and '74. We are in litigation with the Department of Health in reference to their audit findings for calendar year 1970 and '71, even though we paid back the funds that the Department found on the audit. We paid it back and we are suing them to recover. We are in litigation with them for calendar years '72, '73 and '74. Several of these disallowances -- and I will go through them individually if you like, your Honor --

DR. CICERO: I was asking you a specific question.

Were there any disallowances of the total that we have here of $102,000 in reference to you doing business with a related company and we disallowed the profit you made on doing business with the related company?

THE WITNESS: No.

DR. CICERO: I frankly don't know the answer to that.

THE WITNESS: The answer is not at all.

DR. CICERO: Any bad debts?

THE WITNESS: None at all.

DR. CICERO: In other words, you don't include anything in there where you charged a private patient and may not have gotten paid, and threw it over on the Medicaid side?

THE WITNESS: Not charged to the Medicaid account.

DR. CICERO: Isn't it a fact that the major part of your loss relates to the implementation of the fair rental system?

Is that a fact or isn't it?

MR. LOWELL: That is one of the very issues --

THE WITNESS: I would like to cross-examine him, also.

THE COURT: We are not going to get into a wrangle. We are just trying to find out a way to go here.

MR. LOWELL: If your Honor please, the last question relates to the essence and the substance of this case.

THE COURT: What is that?

MR. LOWELL: The question Dr. Cicero asked was, does a portion of the losses which your Honor has computed and is in front of you the basis of examining Mr. Benenson relating to the change in the real property method of reimbursement?

The answer to that question I can state, as counsel, is yes, of course.

THE COURT: What does that mean?

MR. LOWELL: The fourth major cause of action which we have in our complaint relates to the institution by the State of a methodology which became effective under these new regulations whereby they no longer give a facility their actual costs which are required, we say, by federal law and which actually should be required, I think, and are required by state law, but they give them something called the fair rental.

It will result in a continuing loss of real property reimbursement between the amount the State gives under this new formulation which we have attacked in our complaint, and the amount that he receives each year under this new methodology.

Dr. Cicero's question perfectly properly points up the fact that --

THE COURT: Explain. I just don't understand.

MR. LOWELL: Can I explain?

THE COURT: Just go on.

MR. LOWELL: Until these new regulations which went into effect with which your Honor is familiar, known as Part 88, it was the policy of the State with respect to a wholly-owned facility, such as Mr. Benenson's, to give the facility interest on its mortgage, depreciation, and real estate taxes, and other costs of property. Those figures --

THE COURT: What do you mean, give to them?

MR. LOWELL: I used the word "give." I mean reimburse them for their actual real property costs.

THE COURT: And would you include depreciation in that?

MR. LOWELL: Yes, of course. Because the State wouldn't give you your amortization dollar for dollar, the State would give you 2-1/2 percent per year of your costs, which was from the accounting point of view theoretically equivalent.

THE COURT: Of depreciation?

MR. LOWELL: On a forty-year basis is what they gave.

As of the Part 88 regulations, they have changed that rule and they put in what is called the fair rental concept, which I have denominated on many occasions as the unfair rental concept in that it does no longer give the actual costs.

In a complicated formula, they provide that they will give a percentage based upon the Medicare rate of return for the previous five years, and they take the historical costs and apply that percentage to the depreciated value of the premises, and they come up with what they call "fair rental."

THE COURT: Say again how they get that once more.

MR. LOWELL: They take a five-year average of the Medicare return on equity, they average that out -- let's say it's 10.2 percent -- and they apply that to the historical costs of the facility as depreciated, meaning if it is five years old, it has been depreciated under their formula 2-1/2 percent a year, times, let's say four years, times 4. That is 10 percent, so if it cost $5 million, the figure they use is $4,500,000, which is 10 percent of the $5 million, which they say they have already paid them back. They take the $4.5 million and they apply to that this constant factor called the fair rental factor, which they are going to pay, based upon the average of the five years of Medicare rate of return.

As I said, as an example, let's say that came to --

THE COURT: I am just not with you at all. I just don't understand.

MR. LOWELL: If your Honor please, the difficulty is not with your Honor in any way, shape or form, nor with me. This is a tremendously complicated thing which when it came out -- and I have been living with this stuff for a number of years -- I had to read about seventeen times before I understood what it meant.

But what the bottom line of this, your Honor, is, is that they give him and they are going to give him in the future an amount for his real properly costs which will fall short of his actual real property costs.

That's the issue.

THE COURT: Depreciation isn't an actual cost in any event.

MR. LOWELL: Depreciation in terms of what the State has been doing since time immemorial and what the federal government provides for under Medicare, and what any certified public accountant will tell you, depreciation is a cost item. It is not a cash flow item, it is a cost item.

And they say that the new percentage that they are giving -- they don't deny that it is supposed to include depreciation. When he pays his interest and his amortization to the XYZ Bank in Queens, he will have available on an annual basis --

Q How much less?

A They will pay me $210,000 and I have to pay the bank in terms of interest and amortization $276,000.

MR. LOWELL: He will, therefore, fall short $66,000 a year.

It is not for your Honor to make a decision on that today. We don't expect that. But this is one of the major issues of this case, and it affects all the wholly-owned facilities in the facilities case in terms of what happens to them in the future.

THE COURT: I tell you that is very helpful.

Let me ask Dr. Cicero:

Let's take the Flushing Home and turn to you. What we have is an allegation that the Flushing Home will lose this year even with an amended rate, which has been agreed to, and even if it goes -- well, it will become, I guess, it will be retroactive to November 1, won't it?

THE WITNESS: The beginning of the year. The new rate is retroactive to the beginning of the year.

THE COURT: What year?

THE WITNESS: 1976.

THE COURT: Oh, the beginning of 1976.

But he says he has an $83,000 loss for the year and he says that that is a cash loss, you have knocked out depreciation and so you are going on a cash basis, you have to add amortization payments to the bank and so he has a cash loss of $158,000 for the year.

Of course, for part of that year he had a little higher rate than he has now.

So, what do you say? If he is losing money at that rate, he is not going to be in business very long.

DR. CICERO: Your Honor, I would like to apologize to Mr. Benenson if he felt I was cross-examining him.

THE COURT: No, we're not worried about that.

What is your response?

DR. CICERO: I say, your Honor, that there are two issues and only two issues that remain in the Flushing Manor Nursing Home. One I would like to leave aside for a moment, the fair rental issue. I would like to leave that aside for just a moment. That makes up the bulk of the issue.

The second issue that remains is this question of nonallowable program costs. In other words, he has costs in his report that are not allowable in our mind.

THE COURT: Where are those costs? Where is this report that you are talking about?

DR. CICERO: The report that is submitted.

For instance, we asked him if he did business --

THE COURT: Do you have a copy of that report?

DR. CICERO: I have it right here.

MR. BRADLEY: Could we use it for a moment?

THE WITNESS: I gave your Honor a copy of that.

The Basem enterprise. It's related and it has always been realted, and it has always been reported as being related.

THE COURT: Where is that located? I have to have the document. You will have to arrange to get it to me.

Let's mark this as Facilities' Exhibit 3. I can follow this a little better.

I tell you, I just think that if you have comments, address them to me, and don't have a go back and forth with miscellaneous directions.

What is your point?

DR. CICERO: The point the Department was trying to make is that the Department does not allow a nursing home to make profit when they do business with a related company, such as one where the nursing home is owned by the son and the related company, let's say, is a dietary concession owned by the mother, and so we just include for an allowable expense -- I am not an expert in this, your Honor. I am just giving it to you very generally -- the actual cost of that transaction, so if you look at line K, and it says $170,000, we were actually billed 220, so there is a $50,000 disallowance which we say should not be allowed because you are dealing with a related company.

THE COURT: Just go slower.

DR. CICERO: Line K, R-e-l-c-o Company.

THE COURT: I see the line K. Now, what I don't understand is what the $170,000 is.

DR. CICERO: The amount we allow of the $220,000 that was billed for.

THE COURT: Wait a minute. When you say "billed for," they include a $220,000 as a cost.

DR. CICERO: Yes, your Honor, that's it.

THE COURT: For obtaining what, some kind of food products?

DR. CICERO: Whatever.

THE COURT: Whatever it was?

DR. CICERO: Right.

THE COURT: And you say okay, this is a cost paid to a related company and therefore we will disallow part of it?

DR. CICERO: The profit; everything above the cost.

THE COURT: Whose profit, the related company's profit?

DR. CICERO: Yes, your Honor.

THE COURT: In other words, you are not going to allow this home to pay a profit to a related company?

DR. CICERO: Right. Absolutely right.

THE COURT: How did you get the $50,000 figure?

DR. CICERO: I assume that was a cost-related figure. Financial statement that was submitted, I assume.

THE COURT: Okay.

Well, let me just ask this: This is for the twelve months 12/31/74; right?

DR. CICERO: Right.

THE COURT: How does it bear on anything in any of these?

DR. CICERO: That is what we did. That was what we projected forward.

What we are saying is you have two issues here. One is the fair rental loss which I would like to lay aside, and one is the program costs that we do not feel are allowable that he wants in, and if they were in, they would increase the rates; no question about it.

THE COURT: In other words, if this 50,000 were in, it would be 50,000 more dollars to them in this year?

DR. CICERO: Exactly.

THE COURT: Let me just ask you, Mr. Benenson.

Was it true that you submitted costs that included $220,000 for purchases from this related company?

THE WITNESS: Your Honor --

THE COURT: Just answer me yes or no so we can go forward: Is it true?

THE WITNESS: You are dealing in an area that involves criminal activity and I would like the record to be straight here.

Dr. Cicero has deliberately distorted the figures.

THE COURT: You are not responding to my question. You can answer yes or no, and if it is distorted, the answer will be no.

THE WITNESS: No. The answer is no.

THE COURT: In other words, you did not submit cost figures that included $220,000 for purchases from this company?

THE WITNESS: Not for reimbursement, sir.

MR. LOWELL: Can he explain it, if your Honor please?

THE COURT: Certainly.

THE WITNESS: Your Honor, the Department has made many headlines nowadays about illegal activities.

THE COURT: I do not want to have speeches.

THE WITNESS: In 1972 we formed a company called Basem. We reported it to the Department on every HE-2, which is our cost report as filed.

THE COURT: What is the name of it?

THE WITNESS: Basem Enterprises, Inc.

THE COURT: What is that?

THE WITNESS: It is basically a management company for food service.

THE COURT: Who owns that?

THE WITNESS: It is family-related.

THE COURT: Well, who owns Flushing Manor?

THE WITNESS: Esther Benenson.

THE COURT: Is she related to you?

THE WITNESS: Yes, sir, it is my mother.

THE COURT: All right. Esther Benenson and --

THE WITNESS: That's it.

THE COURT: Who owns Basem Enterprises?

THE WITNESS: I own a portion of it, as well as my sisters. I have three sisters, your Honor.

We have reported the transaction, in other words we have reported the amount we have charged to Flushing Manor Nursing Home from Basem as well as the expenses that Basem incurred in those sales, and every year appropriately and unchallenged, the Department deducts the charges to Flushing Manor and substitutes the costs.

Indeed, our accountants, supplied the Department with an allocation becasue not all the business is done with Flushing Manor Nursing Home and it is an acceptable, fully disclosed relationship that the Department has known about for many years and has accepted the costs.

THE COURT: I think you are really getting beyond anything that needs to be described.

THE WITNESS: We have never been reimbursed any profit for Basem in any year.

THE COURT: Then you are saying exactly what Dr. Cicero said.

Q More specifically, Mr. Benenson, in terms of the figures which you presented to the Court and to the principle which you have elicited that you have never been reimbursed for that, tell the Court whether or not the differential which Dr. Cicero pointed out, whether it is $50,000 or whatever, is included in the losses which you have previously explained to the Court.

A No, sor. There is no ptofit for Basem in the statement of the projected losses.

THE COURT: That is the crucial thing.

DR. CICERO: In our estimation, your Honor, we estimate that the deficit is $314,000, the fair rental loss is $180,000 and the program loss is $133,000.

THE COURT: I don't know the meaning of these. Let's go back to the financial statements for the moment.

He projects, and I am sure you have this material, he projects a loss for the year as we have described it. We have already gone through the figures, and what he is saying is that there is no help or adjustment to that loss by talking about purchases from related companies because he is saying that the profit to the related companies is not included in the losses he has described.

That is a very important statement. Do you challenge that?

DR. CICERO: The findings of fact, your Honor, on our exhibit, which I am not sure you have a copy of --

THE COURT: I do have a copy of it.

DR. CICERO: -- go to the opposite of that.

THE COURT: Where do you find the opposite?

DR. CICERO: Right on the findings of fact.

THE COURT: Just read it to me if you don't mind.

DR. CICERO: Nonallowable program costs of

$102,553.

THE COURT: What are the components of that? Do you have the worksheets?

DR. CICERO: $28,068 in bad debts. You have that.

THE COURT: Just a minute.

Is that $28,000 contained in anything that is part of the findings of fact?

DR. CICERO: Item C.

THE COURT: All right. Now, bad debts, what line is that?

MR. BRADLEY: Middle of the page, your Honor.

DR. CICERO: C, your Honor.

THE COURT: Okay.

DR. CICERO: It's business tax.

THE COURT: Business tax.

What are the other components of the $102,000?

DR. CICERO: $9,334 on the salary ceiling. Up above that, your Honor.

THE COURT: I have that.

What else?

DR. CICERO: Every other item down that line.

The minus 390, the minus 1,700, and so forth, and, of course, the big one being that 50,000 differential on the related company operation.

All that adds up to $102,000?

THE WITNESS: There is a positive adjustment also that brings the total net adjustment up to a positive $82,000.

MR. LOWELL: He was granted appeal which has to be included by reason of certain increases in labor costs which were mandated by the State Health Department and again is one of the issues.

THE COURT: You are going too fast for me.

Dr. Cicero, I asked you to give me the components of the $102,000. I don't find them anywhere and I don't understand them.

DR. CICERO: I don't think I know enough about it to get into it, your Honor, on those specifics.

THE COURT: I asked you to comment on Flushing Manor, and maybe you are not ready to comment.

Is anybody ready to comment?

MR. BRADLEY: Could we have just a minute, your Honor?

THE COURT: Okay.

(Pause)

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THE COURT: Mrs. Wall.

MS. WALL: Your Honor, the 102,000 is the sum of the non-allowed costs here that start on --

THE COURT: You are talking about that sheet which I guess I have marked Exhibit 3?

MS. WALL: Right, it is 9434 plus the 390 plus all the figures down.

THE COURT: All minuses?

MS. WALL: Yes, except your net, the 170 and the 220.

THE COURT: Net what?

MS. WALL: 50,000 from the 220 and the 170 is the related company expense.

THE COURT: Wait a minute. I have a list of figures on the righthand side of the paper starting with a minus 9434. Then I have another series of smaller minus figures. I guess there is one that is 28,000. Then I come down to item K which is minus 170,346.

MS. WALL: That's plus 170 minus 220.

THE COURT: I see. It is a net reduction of 50.

MR. CICERO: Right. That is the point on the related coverage.

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MS. WALL: And the 184,000 that is added is an appeal that was for nursing.

THE COURT: That figure below it, it isn't very readable, it's 184.

MS. WALL: $1000.

MR. LOWELL: Plus.

THE COURT: That was the appeal that was just allowed?

MR. BENENSON: No, this is an appeal from 1975, your Honor.

MS. WALL: This is for added staff, nursing, I believe.

MR. LOWELL: These are 1974 figures, your Honor is dealing with.

THE COURT: Then where do we go from there?

MS. WALL: Therefore, the bottom line is a plus 82,000 but it includes the 184,000 so the difference between 184, which was added as an appeal and 82 gives you the 102,000, which is disallowed.

THE COURT: I don't understand that.

MS. WALL: 184,000 was added for the added staff. If you subtract all the other numbers up there, you get 82,000. All those numbers add up to 102,000.

MR. CICERO: In other words, your Honor, all the negatives when added together and subtracted from the plus 184,000 come out to be plus 82,000, meaning you subtracted $102,000 which are non-allowable expenses.

THE COURT: I am just sorry to be so obtuse but I don't understand it.

MR. BENENSON: Your Honor, there is no disagreement.

THE COURT: As long as we have taken this time it might be helpful to me to understand what you have done.

MS. WALL: Your Honor, if you take the appeal out of this sheet and subtract the 184,000 from the -- if you just eliminate that line of 184,000 which is a separate item, an appeal, your sum would be minus $102,000.

THE COURT: And that represents what, disallowances from their costs as submitted as samples of their costs for this sample year, right?

MS. WALL: It represents costs as submitted on an HE2 report for the year 1974 which is used in establishing the rate for 1976.

THE COURT: Let's go over to this finding of fact.

MR. LOWELL: Before you do that, your Honor, can I have only one point?

THE COURT: Yes.

MR. LOWELL: Because I understand this, Mr. Benenson does, we know why your Honor has a problem but in terms of your Honor's problem for the year 1976, the figure at line K, when it is brought into 1976 not 170 -- explain it to the Court.

MR. BENENSON: Your Honor, these are their findings on desk audit. Some of them we expect and it is normal procedure. Some of them there are disputes about and these disputes are normally agreed upon between the department and us. Nol all of that 102,000 do we agree with.

MR. LOWELL: What are the two items you don't in terms of cash flow for 1976?

MR. BENENSON: In terms of applying it to 1976 the $50,000 which they say profit from the related company doesn't exist in 1976 because there is no profit in that company.

The second item is they picked up $170,000 worth of costs from that related company.

THE COURT: This isn't helping me. Approach it in another way. I want to take the 102,000 figure which at least I understand from that particular exhibit. If we could come over to the findings of fact, because I don't understand how the department has cranked the 102 in and if I understand that then I understand that then I can come back and talk intelligently to Mr. Lowell and Mr. Benenson.

But you have this page that says findings of fact and you have a figure 102. Are you saying that that should be subtracted from something? And if so, from what?

MS. WALL: We were assuming that there were 102,000 of non-allowable costs in 1974. Then there are still approximately $102,000 of non-allowable costs in 1976.

THE COURT: Are you saying that when they report a loss that that loss should be reduced by 102,000 for instance?

MS. WALL: Yes.

THE COURT: What is the loss that should be reduced by the 102,000?

MS. WALL: 314,000.

THE COURT: The 314,000 comes from where?

MS. WALL: From the 1976 reported cost,

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the submission that we had I think it was a six-month submission which we annualized and then we --

THE COURT: Let's get it, please. Just bear with me. You must have gotten this June 30, 1976 statement, right?

MS. WALL: Yes.

THE COURT: What did you do?

MS. WALL: Doubled it.

THE COURT: What if anything did you double?

MS. WALL: I am sorry, I don't have it in front of me but I assume it is --

THE COURT: I wish you could find it. Here is the six-month statement if you would like to look at it. Can you give her that?

1,913,672 total operating cost.

You doubled that?

MR. WALL: Yes.

THE COURT: Then you do it --

MS. WALL: The 1976 Medicaid rate and multiplied it by the days and assumed that that was their income.

THE COURT: This wasn't actually what they did receive in 1976, this is the new rate applied on an annual basis, right?

MS. WALL: Yes.

THE COURT: Right?

MS. WALL: Yes.

THE COURT: That would produce a deficit of 314,000, right?

MS. WALL: Yes.

THE COURT: Okay.

What did you do this fair rental loss --

MR. CICERO: Your Honor, that is a key position, that we'll develop into a key position in this case as Mr. Lowell mentioned before. It is a rather complex matter. Just for the Court's information, however --

THE COURT: I would like to pass that for just a moment. Because I don't think I can resolve that at the present time, so I am just going to take your 314,000 deficit. There are other figures that have been talked about.

MR. BENENSON: Can I explain the difference between their loss figure and our loss figure?

THE COURT: I think I know what it is.

MR. BENENSON: They calculated my income using an incorrect number of patient days. They calculated the income using an incorrect number of patient days.

THE COURT: You mean the official rate figure?

MR. BENENSON: They took the official rate figure and multiplied it by the number of patient days they thought I would have. They neglected to take into account, your Honor, that they requested and I complied with a reduction in beds on January 6 of 1976.

THE COURT: Is that right?

MS. WALL: Two beds. He decreased beds by two and we did not take that into consideration nor do we take into consideration the private income.

THE COURT: How is the private income?

MS. WALL: That would have reduced the loss.

MR. LOWELL: Is private income, your Honor, from private patients which the federal regulations prohibit.

THE COURT: What do you say the deficit should be if you do it right? Let's correct it.

MS. WALL: I have to take the days that he is reporting. I use the days that he reported.

THE COURT: We are trying to analyze the Flushing Manor Nursing Home and I have a figure here

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MR. CICERO: Absolutely, your Honor.

THE COURT: I will mark that.

MR. LOWELL: But they both agree it is a negative.

THE COURT: Let's assume it is 314.

MR. CICERO: We are very close, your Honor.

THE COURT: I will just forget the fair rental loss for just a moment. They say that whatever the deficit is, it should be considered reduced by the non-allowable program costs of $102,000 because these assume that those non-allowable costs are included in your 3,827,000 cost, isn't that what you are saying, Mrs. Wall?

MS. WALL: Yes.

THE COURT: Is that correct, or not? Are those 102,000 --

MR. BENENSON: That is incorrect, that is wrong.

THE COURT: In what way is it incorrect?

MR. BENENSON: First of all, it is off by the $50,000 profit that is related for the related company.

THE COURT: Because you are saying that's not and apparently it isn't the right figure. Give me an estimate of what the right figure is. Please.

MR. CICERO: Your Honor, she would have to have a calculator to do that.

(Pause)

THE COURT: The 416 is based on more current projections of costs, I guess, isn't it?

MR. BENENSON: Yes, that is '76 and this is '74.

THE COURT: For my purposes I don't really have to know whether it is 314 or 416. Not that that isn't a lot of money difference, but whether it is 314 or 416, it is a lot of money.

MR. CICERO: But, your Honor, the 416 doesn't include the rate change in there, does it?

MR. BENENSON: No.

MR. CICERO: Well, our 314 does, it assumes our rate change. His 416 doesn't so it is actually very close here, your Honor, what we are talking about.

MR. BENENSON: I didn't understand that, your Honor.

THE COURT: Your official rate is the amended rate?

in your costs.

MR. BENESON: That's right.

MR. LOWELL: In 1976?

MR. BENENSON: The figures I submitted to you, there is no profit in there for Basem. It is also in error because there are several items here which will be through the normal appeal processes, corrected and put in our rate, several small items.

But the most important reason it is wrong is that it is 1974 costs and we are dealing with 1976 and to give you a minor example, your Honor, 1974, the winter was probably the warmest winter. In 1976 we are having ghe coldest fall and there is no way that you can project for that.

What I have given you is actual costs and they are per our books per expenditures.

THE COURT: That doesn't meet the issue. They say that they would assume thatyou have these different items that were disallowed according to this Exhibit 3, you have those items in your 3,827,000 costs and they have estimated it is the same 102,000 but that is an estimate.

But are you telling me you have none of those items in the costs?

MR. BENENSON: No, I am saying the department isn't saying that I didn't spend the money, they are saying that they won't pay and they are not responsible to pay for that money.

MR. LOWELL: Can I ask him a question? I understand what the Court wants to know.

Q Mr. Benenson, let me try to be of help to the Court. You have indicated that with respect to the $102,000 based on the 1974 as explained by Mrs. Wall, that 50,000 of it is not in the 1976 because there was no profit for Basem, is that a correct statement?

A Yes, sir.

Q Therefore, the 102 is reduced by 50 to 52. The Court wants to know with respect to the remaining 52, forget little numbers that you are going to straighten out by a minor appeal with respect to the remaining 52, do you schedule the 52 or is there any major item, you had indicated to me there was an item with respect to the nursing appeal that in '76 it was higher. Is there any major item such as that which you can explain to the Court which would reduce the 52 further? Now tell the Court that is the right figure.

A There are approximately $5000 from that 52 that have to be taken off.

Q So you say -- then in rough terms, you and Mrs. Wall agree with respect to approximately 45 or $47,000?

A That are non-program costs but they are costs, yes.

Q Yes, yes, but the Judge is not concerned with that.

A Yes.

MR. LOWELL: So, your Honor, on that issue, we say that the number is approximately $45,000 and that we agree with Mrs. Wall on and with respect to the others.

THE COURT: That is very clear. That is helpful. What does that do to us and then should we then take out -- remember, we arrived at a cash loss of $158,000, do you remember that?

MR. BENENSON: Yes.

THE COURT: Should we reduce that by 45?

MR. LOWELL: Assuming those are there in terms of what your Honor is trying to structure I agree that we should take out the 45.

THE COURT: At least for purposes of

discussion --

MR. LOWELL: His position is, and I can explain it in one sentence, that while they are not reimbursed for Medicaid purposes and that is why they are narrowing in on that, in terms of the issue in a preliminary injunction, he is being half a lawyer, he has a cash flow problem, he has to pay them anyway.

THE COURT: I get your point. I think I see your point and the other point and I think I understand that.

The administration, when they say facility. You have department recommended cuts and you have facility response. What do you mean by that, Dr. Cicero?

MR. CICERO: On the findings of fact?

THE COURT: Yes.

MR. CICERO: I guess we reached no agreement on the first one, the 102,000 except what we have now. The 8000 is what Mr. Benenson informed the Court that he either had already proceeded to implement or was already in place, the 8000.

In each one of these cases, that is the offset. They agreed with the administration that they could cut $8000. In nursing they could cut 18,000 and so on.

THE COURT: The only thing he was saying is that some of it had already been implemented.

MR. LOWELL: The 6 and 7500 figures that your Honor calculated yourself. That is the figures that by substracting what he had already done in the year 1976, you netted it out for your own purposes and you came up with the $13,500 figure.

THE COURT: I guess I came up with $11,700, but I understand your point.

MR. LOWELL: Whatever it was.

There is one thing that strikes me, and that is that as of the six months, there was a net loss from operations of 208,000. That was lone before the new rate.

MR. BENENSON: That reflects the new rate.

THE COURT: I am looking at the six-month statement.

MR. BENENSON: Yes, your Honor, and that statement was restated on September 3 to reflect the new rate.

THE COURT: This was the statement submitted with your affidavit.

MR. BENENSON: It is a six-month statement.

It is the same thing. That was restated by the accountants. They have to restate it.

THE COURT: Retroactively --

MR. BENENSON: That's right.

THE COURT: So you are assuming retroactive application of the new rate?

MR. BENENSON: Yes, sir. That is what the rate says. It says it is retroactive to January 1.

THE COURT: I really misunderstood you entirely.

MR. BENENSON: The department is assuming that also.

MR. LOWELL: Everybody is assuming that we are giving you calendar figures. Nobody can give you non-calendar figures. If you would like it on a month to month basis we can tell you what that is, too.

THE COURT: In other words, these loss figures that you are speaking of assume retroactivity to the November 1 rates, is that right?

MR. CICERO: To January.

THE COURT: Retroactive to January 1, 1976.

MR. LOWELL: We have all been assuming that.

THE COURT: And let us suppose that the

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retroactivity feature was suspended so that for purposes of present discussion, we considered the new rates only in effect after November 1, what would your loss be,if any, for the year.

Because, if you remember -- you weren't here, but in the Homes case, the witnesses were very careful to come in with the very exact accounting of what would be the situation assuming the new rates were in effect beginning November 1, what would the situation be if they were made retroactive, and of course, I think the state has long since told me that they are not seeking to collect the retroactive feature before November 1, at least right now for the purposes of our present discussion, so if we are talking about financial emergency, I want everybody to understand that they are not to present me any figures assuming retroactivity to January 1. This is a total waste of time.

What are your figures assuming only new rates beginning November 1? I wouldn't have spent all this time on these figures. It is a total waste of time.

MR. LOWELL: If your Honor please, you can teka November and December. One-sixth.

THE COURT: I am just giving these back to you. I don't know why it was even presented. I have plenty to do in this case without that.

BY MR. LOWELL:

Q Mr. Benenson, can't you respond to the Court's figures what is the figure through March 31, 1977?

MR. CICERO: The rates get trended upwards in January.

THE COURT: I don't want any discussion down there, just bickering. You tell me what your annual loss, what your loss would be, what we were given in the Homes case, we were given a two-month loss if any, and then we were given an annual loss based on two months lowered rates beginning November 1. What are those figures?

MR. BENENSON: Your Honor, a close approximation would be about $28,000 cash flow loss.

A I would like the statement for the first part of the year without the retroactive feature cranked in.

MR. BENENSON: Would you like me to work it up now?

THE COURT: I don't have time for you to work it out. If you don't have to now, I don't know why you don't.

We are talking about a cash flow format. Nobody has paid back those rates back to January 1.

MR. LOWELL: I have it, your Honor, please.

MR. BENENSON: For the first six months as the statement reflects, there would be no P&L loss and there would be a cash flow positive.

THE COURT: What statement reflects that?

A The June 30 statement.

THE COURT: Has that been tiven me?

MR. BENENSON: Yes, sir, that is the same one we looked at before.

THE COURT: Where is the figure for June 30, without including any retroactivity for the November 1 rates? Where is the figure?

MR. BENENSON: There is an item in the income section called less provision for adjusted Medicaid interim rate, $209,000.

THE COURT: On what page is it?

THE WITNESS: Exhibit B, page 4. If you subtract -- if you add that item back to the net loss from operations, you have a virtual zero balance, which means we broke even.

MR. LOWELL: Including your private patients?

MR. LOWELL: What is your Medicaid loss?

MR. BENENSON: My Medicaid loss, if you look at the room and board private patients was $162,000 for that period so that means that my Medicaid loss for that period would have to be approximately the same number.

MR. LOWELL: Which is?

MR. BENENSON: $162,000.

THE COURT: This is not presented in any way that is relevant to my problem. I cannot sit here with financial statemens and have them recalculated. You have got to get your materials in order and you have to present them to me in ways that relate to our problem. The retroactive feature is irrelevant for present purposes. The only relevant problem is what is the effect beginning November 1 of the new rates and you study the format which the Homes people presented and that is all you have to do. It was exactly what should have been presented.

I just incorporate that presentation and you follow that and you will give me the relevant statistics. Some of the questions were asked by me but by and large

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those people were ready with the relevant information. I just can't take time to redo all this, so I will just suspend on the profit homes here and now.

Let's go back to the non-profit homes.

MR. STERN: Your Honor, could I ask according to the -- I will agree to the state's procedure, could they just move to St. Cabrini's? I have somebody present here from St. Cabrini.

THE COURT: Fine.

Let's take up St. Cabrini, Dr. Cicero.

MR. CICERO: That is the one we wanted as the second case.

Your Honor, you recall that.

THE COURT: The findings of fact for St. Cabrini will be Homes Exhibit Y.

Go ahead.

MR. CICERO: Your Honor, what we tried to do in our presentation was we tried to show you with Loretto Rest one situation because we thought it was important fortheCourt to know and that is why we were prepared to ourselves bring forth the St. Cabrini case becasue that is the opposite of Loretto Rest. That is, of recommended annualized reductions of $569,000 that the state identified which would not in any way affect their good state rating, they agreed to none of them. Not a dollar's worth by and large and that is a general statement but by and large there was just no agreement with the state on any cut. It is the exact opposite and I suggest, your Honor, it go to the heart of the case.

THE COURT: How?

MR. CICERO: Who is going to be irreparably damages, your Honor? If the state and the industry -- and I use that term in its finest sense -- can't get together here and make the appropriate cuts that are necessary, there isn't going to be any industry or any state and that to me is the essence of the case.

THE COURT: Just a minute. If we get off on these flights of oratory we won't get anywhere.

What it illustrates ot me is that -- well,it illustrates there is no agreement and that illustrates that there is a problem which, if we are dealing just with the St. Cabrini Home, somebody would have to take some time to resolve. Because you may be right, they may be right or it may be something down the middle, correct?

MR. CICERO: Yes, sir.

THE COURT: Okay. The last person in this room who knows whether they should cut or not cut is me. This I think illustrates a problem that I did talk about with the lawyers this morning and mentioned at the beginning of our session.

If you are going to cut a home, cut the rate paid to that home, and if you are going to cut it with little or no notice to them, then it is an unfortunate segment for working out what might be a difficult problem. Because they have simply been cut. There wasn't any advice to them in advance about the recommended $569,000. There wasn't any opportunity to hash it out with you or with anybody else. They are simply cut.

Wouldn't it have been better in advance of cutting them to say "What about your reducing your costs $569,000, what do you say?

Then they would come back and give their side and then if worse comes to worse a Court or some administrative agency solves it. But in the meantime, they aren't cut.

I think that if there are going to be disputes that may take a little time to resolve, I have a very severe problem with a cut before there is any opportunity to even discuss or be heard on those things. Do you get my point?

MR. CICERO: I understand fully your point.

THE COURT: This to me represents the problem I was discussing with Mr. Mantzoros this morning and I am rather inclined to the view that the rate should be reinstated pending a resolution of these factual issues.

If there is some good way to find out quickly about the validity of your recommendation, I am all for that and I will help in any way I can because if the state can save $569,000 a year, that is money that belongs to all of us and I am all for that. It just goes without saying.

But that hasn't been established yet, and without that being established, they have had their rate cut, without any notice at all, and I don't mean to belabor this, but I return to my view that I think from a standpoint of any kind of sensible procedure, we are running a very grave risk in simply cutting that amount of money without finding out the facts or without presenting the recommendations, without taking a little bit of time to work this out. That is the home that says they are four months behind in paying their suppliers.

What are those suppliers supposed to do, carry them? Are they running banks? That isn't a desirable thing.

I am going to propose to you that there be consideration given to an interim restoration of that rate. I found you very fair and I don't mean to be getting strident with you.

MR. CICERO: I understand.

THE COURT: But that is my feeling.

MR. CICERO: YourHonor, may I respond to that?

THE COURT: Yes.

MR. CICERO: Your Honor, the manner in which we selected the four homes in the proprietary side. The manner in which we decided to select Loretto and Cabrini was done with forethought with trying to present the problem to you.

The problem is although I fully understand your concern and I know what you want us to do, that is what we tried to do this week. I felt that my heavens, I understood clearly what you told us last FViday and believe me, we ascribed 90 people to it and everyone of them knew exactly what your instructions were.

But to go from Loretto Rest where everything is totally agreed upon except for patient assessment and patient mix, which has long been recognized as an established procedure to zero, to zero, to me I think -- I am prepared to go along with the Court on this but I think St. Cabrini and its representatives have to understand that the Court is looking for more than zero.

THE COURT: Wait a minute. Here is my point: The fact that there was this agreement at Loretto does not convince me in any way that there should have been an agreement by St. Cabrini. Indeed, it could be that Loretto was so under the gun, that that was an important factor. That is what Mr. Stern has represented.

Those are background facts that I don't have full command of by any degree, but I am just coming out with the bare conclusion that the mere fact Loretto agreed doesn't mean that St. Cabrini should.

MR. CICERO: I agree with you.

THE COURT: So we come back to St. Cabrini taking it as an illustration and there are probably others like it. I wasn't present at the negotiations. Maybe St. Cabrini was taking a very obstinate position, maybe they were bargaining hard, all kinds of things could be the case. I just don't know. Maybe their financial hardship isn't so much that they can take the risk and bargain hard at that point.

There are lots and lots and lots of possibilities but the fact remains that if we never move an inch father than we are now we have complete disagreement. How do we move that? I am sure there are lots of ways.

. I could have discussions, I can take testimony, I could try to dig into this, I could go up to the nursing home, on and on and on, but this is only one of many, many, many cases, at least potential cases, but even just focusing on St. Cabrini, I really don't know what is the best thing to do.

I have a feeling that I won't really have a very good judgment as to whether they should cut these costs and I am not sure that that is really quite my business. I would have to really understand nursing home operations to a much, much greater extent than I do now in order to advise anybody on whether they should cut those costs. It would take me a good long time and a lot of educating and observation and steeping myself in it to do that.

You see, I am thinking of it in a particular framework. I realize that these rates are going to be subject to revision and that they do expire March 31, so I don't want to get into those intricasies. I don't think it is appropriate. There are other people that are going to do that job.

But what do we do in the interim? If a home has had its rate cut and there is a dispute about what are valid costs there, and while maybe that dispute will kind of wash out in the goal around its being done on a general basis, in other words, if St. Cabrini has these costs that are way in excess of what is compensated for by the present rates, presumably Cabrini and people like Cabrini can present their point of view in the discussions in the ensuing months, right?

MR. CICERO: Yes, sir.

THE COURT: So it is very possible that there will be some resolution of that kind of issue by people a lot more expert than I am in the ensuing months. Right?

MR. CICERO: Assuming both parties agree on what the code means and that sort of thing, your Honor, that is what we went through.

THE COURT: Let's assume everybody is

intelligent and reasonable at least the different points of view can be presented. That is going to be done in the ensuing months, isn't it?

MR. CICERO: Yes, and that is what really happened.

THE COURT: Okay, now in the meantime I am told that Cabrini is in a financial emergency. And your answer to that is that they could start cutting 569,000 in costs.

I wish I could present it to you in the way that I feel it and I am probably not articulating it well, but it is not a very good posture to have them cut without notice, without opportunity to discuss and simply told you can cut 569 when we really don't know, and in the meantime while all this is being hashed out, the suppliers don't get paid, they may run into a position where they can't pay their salaries and I don't know sitting here whether they should cut a single employee or not.

Loretto was a lot easier. They at least on paper made an agreement. I think that we have come to the point we have to see a solution for the St. Cabrini type of situation. Let's talk about it.

Let's suppose that St. Cabrini is being

reasonable. Should St. Cabrini be rewarded for its obstinance? No, it shouldn't. But I would say this. There are some solutions which could take that into account and perhaps one of them would be -- although this is complicated as all get out, but it could be agreed that the pre-November 1 rates were restored to St. Cabrini subject to further review, subject to the requirement that they be repaid if it is found that the cost savings could have been effected during this interim time, something like that.

We could get to the point where we just appoint a special master to go into all these details, but there are devices to work with. We are not helpless. Let me ask you. I keep talking, but all these thoughts come to my mind.

Let's suppose that the cuts should be adopted. What about beginning November 1? You didn't make that suggestion to them beginning November 1. So it seems to me that really in a way one could say some money is owed to them until these cuts can be effected. They can't be effected before today. How soon could they be effected? And really cut these losses and get them back to paying their bills?

MR. CICERO: I think, your Honor, that

clearly the nursing home groups in this state did know the law, did know the ramifications of the law and did know what prudent buyer was all about and did know what the rating system was about.

Your Honor, we met with every nursing home operator in the State of New York to discuss the rating system and all the ramifications of that, your Honor.

THE COURT: When did you meet?

MR. CICERO: All during the course of this year. We had selected meetings by regions, and I am sure both learned counsel would agree with that.

MR. LOWELL: If your Honor please, I do not agree. It was not done until after September.

THE COURT: Just a minute. Go ahead.

When did the homes learn through new rates that came into effect?

MR. LOWELL: They were sent out I believe October 31, your Honor. Effective November 1. Their ratings, their ratings from the rating system I think all went out May 13 of this year. Every home in the State of New York was notified.

THE COURT: What did that mean as far as dollars and cents?

MR. CICERO: It meant that that was going to be tied into the way the rates were set, your Honor, by law.

THE COURT: Were they told?

MR. CICERO: Of course, 2803 to 2808 of the public health law.

THE COURT: Were they told for instance that for a good state home the costs would be cut off at a 60 percentile?

MR. CICERO: No.

THE COURT: Were they told that there would be a lower percentile.

MR. CICERO: Everybody understood that the further down you went on thatline the lower the ceiling would be.

THE COURT: But they were told there would be a ceiling?

MR. CICERO: No question about it. In fact, the law calls for the commissioner of health to waive any ceilings if somebody exceeds the state code until March of 1978, I believe. The law very much called for that, took that into consideration so that everybody who got rated above the state code as very good, had no ceilings applied to those areas, sir. None at all.

MR. STERN: Your Honor, when did St. Cabrini learn that it would be subject to a 60 percentile ceiling as a result of the rating that it got on May 13? That is the question. When did they learn?

MR. CICERO: I am just answering the Court.

THE COURT: What I can't figure out, though, is, and this I am sure would be rather complex if we went into it. You believe that any home was sufficiently apprised of its dollar reduction so that they would be warned to reduce staff or reduce things, because you can talk generalities to people, you can talk about prudent buyer and all of that and maybe in the industry that would mean a lot, but that it wouldn't begin to mean to me, but I must say that I just for the -- you know, based on the information I now have, I am not sure anybody would really be warned of the need to make specific dollar cuts until they got the actual dollars and cents rates.

I could be wrong, but that is the way human beings work.

MR. CICERO: Your Honor, may I respond in two ways to that? I don't think that anyone was told specifically what the dollar rate impact was.

However, your Honor, for this industry to say that they were not aware that the minimum by law and regulation all homes were going to be lumped together, all homes were going to be lumped together, that the differences of grouping by sponsorship were wiped out by this legislation, for anybody not to be able to tell you that that was going to have some rather large effects and that they knew this since April 1 of this year, they knew this since April 1 of this year and I would have to suggest to your Honor that I would raise another issue. What has been doing on since November 1 when they did know?

THE COURT: A lawsuit.

MR. CICERO: Yes, I am so painfully aware.

MR. STERN: May it please your Honor, if your Honor would be interested, the percentile limitation did not become known to the industry until September 30 and indeed I will put witnesses on the stand who will testify that they believe that the 75th percentile was in the process of being considered for use for the good state.

THE COURT: They don't claim that they were told?

MR. STERN: They didn't have the vaguest idea what the impact would be until the day the rates were issued and then they were told that's it.

MR. CICERO: Your Honor, may I suggest a hearing on the St. Cabrini. May I suggest on the St. Cabrini, your Honor, that the department convene a hearing with a hearing officer to develop the facts at a hearing, held at the department? We'll make a record and present it to the Court.

I only say that, your Honor, because if they had agreed with one dollar's worth of cuts, your Honor, I woulnd't say that.

MR. STERN: May I speak to that issue, your Honor?

THE COURT: Let me ask you, Dr. Cicero, have you any idea of what changes or adjustments will be made in the system? Has anything been learned from this that will result in changes? I think we did mention earlier that there may be some more consideration given than has been given to this question of large numbers of intensive care patients, the patient mix question.

But I would like to know if you have any idea of what is in the offing now.

MR. CICERO: I can answer that two ways, your Honor. What is in the offing now? Not to burden the Court, but our problem is further cuts the government has announced and I will get to the substance of your question of the state requiring $600 million reduction, 600 million in welfare Medicaid package in this state so I don't want to mislead the Court and say that if any were near that sort of package gets adopted next year, that further economies will have to be made.

But leaving that aside, what all the staff that has been involved in this and when I reported back to the commissioner, is that we found some really unreal things, your Honor, because we set rates for ten years on a prospective basis with a trend factor some disallowances and we never believed in nor got involved in what is called prior budgetary review.

In fact, the present commissioner of health and myself flew up to Toronto several years ago to review it because they do that there. When you look at these homes and you do what is basically a budget line item review, you find they can meet all the state standards at tremendous savings of dollars, your Honor.

It is not to say that what those people are doing there isn't beneficial, isn't good for the economy, isn't a nice thing to do for the patients or anything like that. I am not deprecating in any way that. But we have found out a lot.

We also wonder whether the social justice is where just by nature of religious background or some other factor, one person's mother can find themselves in a home that has waitresses come to them and basket weaving classes and that sort of thing the state is paying for and where is the social justice when somebody else's mother finds themselves in a home and these things aren't available.

It is just by matter of geography or something like that. There has to be some equalization here. There has to be some more equitable spread.

These are the things that we are starting to look at by starting to look at them, your Honor, and I don'tknow if that answers your question but I will tell you it is coming to us now.

MR. STERN: Your Honor, Dr. Cicero is making the point quite forcefully. The state has decided this now based upon a review but they didn't tell anybody before they cut these new -- these rates drastically and we disagree violently with the conclusions that he has reached. But evenon the best example that Dr. Cicero points out where Loretto agreed to everything he states, yes, and they're still going to come up $630,000 short.

THE COURT: Let's not hammer that.

MR. STERN: But, your Honor, every single home, St. Cabrini is just an example having no notice whatever, is now faced with these huge deficits while Dr. Cicero lectures us on basket weaving. It doesn't really confront the issues on the injunction.

MR. LOWELL: Your Honor, please may I hand up a letter that Dr. Cicero wrote me on May 21 in which I requested of him in a prior letter,and I have that here too, the opportunity to sit down and discuss all these questions which your Honor just asked him about and we never had such a meeting,we never had such a meeting.

MR. CICERO: Stanley, that is so outrageous.

THE COURT: You can discuss it among yourselves outside. I don't want that. Mr. Lowell, I have heard a lot from you this afternoon, you didn't give me the right figures and I whink you will have to desist.

MR. STERN: Your Honor, would it assist you if Dr. Cicero went through the St. Cabrini and the way St. Cabrini allegedly being obstinate in agreeing to make these cuts?

THE COURT: Why don't you do that?

MR. STERN: Your Honor, since I had the benefit of attending the St. Cabrini meeting, I would like to address the Court with respect to what went on there.

THE COURT: Okay.

MR. MANTZOROS: But you are not a witness.

MR. STERN: Neither is Dr. Cicero.

THE COURT: What happened?

MR. STERN: First of all, your Honor, prior to the meeting we were given what is Plaintiffs' Exhibit 14 for identification. One of them, relating to St. Cabrini, which was read through by Dr. Cicero at the last session.

With respect to food and nutrition, we were told that $463,000 for food and nutrition had been spent by St. Cabrini in 1974. The Department of Health gave a suggested cost of $415,000, which they said would result in a savings of $48,000 to St. Cabrini. That is page 2 of their factfinding.

THE COURT: I see it. Is that right or wrong?

MR. STERN: We asked them how they arrived at the $415,000 and they said well, that was the 60th percentile and so other homes could do it in the 60th percentile on a statewise basis without regard to geography or patient mix or anything else, you should be able to do it.

We said do you have any specific cuts to make? And they said no, you should just review everything but your food purchasing because it seems that that might be the area where your costs seem to be higher.

Have you reviewed the facility asked? Can you tell us a position, who we should fire? No, you are just above it. That was foodand nutrition.

MR. CICERO: Your Honor, would you look on page 6 of the findings of fact, your Honor?

THE COURT: Let's look at page 6.

Well, that really isn't the way it is approached here. It says page 6 of the findings of fact food and nutrition. Facility is spending $4.72 per patient day on food related costs exclusive of raw food costs.

The industry average is $3.98 per patient day. Department suggests a reassessment of the numbers and types of perconnel employed as well as arlary levels in order to reduce the 54 cent excessive cost. Such a reduction would effect a savings of $48,000.

Well, thatis still just a lot of averaging.

MR. STERN: The excessive cost we said where is it. Have you looked at our budget, our expenses? No, we just arrived at the suggested cost by taking the 60th percentile.

THE COURT: They say the industry average.

MR. STERN: They didn't mean industry average. In deference to Dr. Cicero, if your Honor will note what is Exhibit A to the St. Cabrini affidavit, the St. Cabrini finding, you will find that there was a confession of error which I commend them for their forthrightness, they have their facts pretty much poorly stated and Dr. Cicero was led into error at his last testimony.

MR. CICERO: We'll get to that. What does that have to do with food and nutrition?

THE COURT: You are saying there is no significance to the industry average figure of $3.98.

MR. STERN: This is the circle we came in. They said that the 60th percentile limitation was that number.

THE COURT: But the 60th percentile has a meaning, it means that there are homes that aer spending below this. And there are homes spending more than this, more than this percentile, so in a sense, let's call it an average or let's call it the 60th percentile, but you are spending more than 60 per cent of the homes on food.

MR. STERN: And we said --

THE COURT: Are you saying that that has no significance?

MR. STERN: Your Honor, with respect to St. Cabrini's costs which were presented to the Department of Health, St. Cabrini is saying that it has no significance with respect to the ceiling limitation. The 60th percentile.

THE COURT: You are not answering my question.

MR. STERN: Yes, your Honor, it has no significance with respect to St. Cabrini.

THE COURT: In other words, you could not cut a dime?

MR. MANTZOROS: That's where the burden really shifts.

THE COURT: Wait a minute, Mr. Mantzoros. You cannot cut?

MR. STERN: That is correct, your Honor.

THE COURT: How do ou know that?

MR. STERN: Because we have attempted the cuts and freezing of positions during all of 1976 have presented those figures to the Department of Health and said we are trying to act economically, we are not hiring, we are not giving raises.

Do you have a suggestion? Should we fire somebody tomorrow? Tell us. We think we are operating properly and they say well, you obviously are acting imprudently because you are above 60th percentile which brings us right back to the ceiling. That is the ceiling. Anything above the ceiling says the state --

THE COURT: I heard you say that three times but you are just not -- this is not about actual purchase of milk, potatoes and so forth. This item is salaries.

MR. STERN: That is correct and food preparation.

THE COURT: What do you mean, cooking?

MR. STERN: Yes.

THE COURT: Food preparation can just be labor, wouldn't it? I don't know what you mean food preparation.

MR. STERN: Labor, fuel costs for lighting stoves and things like that.

THE COURT: All the things that go in, fuel, I would assume mainly labor, wouldn't it?

MR. STERN: The representative of the Department of Health said that fuel was an element there and obviously fuel costs were up so she really didn't mean to suggest that we cut our fuel so obviously we should cut our labor. She pointed to labor.

THE COURT: All right, now, with respect to labor, didn't your witness say that there had been some effort to cut labor this year? Hadn't there been some effort to cut labor? Had you laid off or done something with your kitchen staff?

MR. FISCHER: Albert Fischer. We have cut our staff. We have not replaced positions where we felt we could do without them.

THE COURT: Have you cut down in the food area this year?

MR. FISCHER: As compared to the general trend from '74 to '76, yes, sir. Absolute dollars or costs are higher but percentagewise our costs per day has decreased.

THE COURT: Have you phased out any people in the kitchen staff?

MR. FISCHER: Salaries are frozen.

THE COURT: But you have not phased people out?

MR. FISCHER: I cannot answer that specifically because I don't have the staffing pattern of today as compared to the staffing pattern of '74.

MR. STERN: Your Honor, with respect to registered nursing the department's position was that St. Cabrini should fire 36 of their 44 registered nurses.

THE COURT: Let's see that.

That is item 2 on page 2.

MR. STERN: For a savings, said the department, of $545,000.

THE COURT: On the detailed part in page 2 it states department recommends reduction of from

40 to 45 registered nurses to 6.4 and the addition of 12.8 LPN's. What is LPN's?

MR. CICERO: Licensed practical nurses.

THE COURT: Amounting to a saving of 391,400. Part of this saving will be offset by increase in aid and attendant coverage.

MR. CICERO: If you look on the fact sheet, your Honor, it is illustrated there. That what we are basically saying is that with the patient care needs there --

THE COURT: Where is the fact sheet?

MR. CICERO: The second page, sir.

We are saying that you can change your mix of the type of professional personnel required to take care of the patients from strictly or majority of which are registered nurses to a mix which is very common all ov er the State of New York to a mix of registered nurses and licensed practical nurses. We gave a plus to the licensed practical nurses and increase your amount of dollars available to higher aides and attendants and the total offset of that, those three together, the total offset of that is $190,000.

MR. STERN: We asked the department.

THE COURT: I don't see 190.

MR. CICERO: That is if you add 153 and 201 and subtract it from 545. It is also in Exhibit B, your Honor, of this -- where we outlined it by specifics by category, the ninth page altogether.

THE COURT: I don't get your arithmetic. But what about that? Is there a kind of a standard as to how many registered nurses have to be present in a facility?

. MR. STERN: Your Honor, our director of nursing who was with us at the meeting had indicated to the people present that she had been criticized in the past for not having additional staff on duty even beyond.

THE COURT: Did she say additional staff of registered nurses?

MR. STERN: There must be registered nurses in order for there to be medication given.

MR. CICERO: Your Honor, the way to answer this question is simple. With the reductions that we request they meet every state standard with reference to nursing care for the State of New York.

MR. STERN: St. Cabrini is hearing that for stht first time and they specifically asked whether in altering this staffing pattern whether they considered the costs involved in laying off 38 people and the answer was no.

MR. CICERO: You said for the first time?

THE COURT: Just a minute, please. Are you saying that a facility like this can get along with the 6.4 registered nurses, is that right?

MR. CICERO: Yes, your Honor.

THE COURT: You would save $545,000 a year on registered nurses but you would hire $153,600 worth of practical nurses?

MR. CICERO: We also add some additional aides and attendants, the next line down.

THE COURT: So the net savings would be what?

MR. CICERO: $190,000 in the laying on of hands if you will, nursing care bedside nursing care.

THE COURT: What are the costs of laying off 38 or so registered nurses? Can that be done right away and does it cost money? What is done?

I raise this because this to me illustrates the time problem. If you suddenly tell somebody -- you have lowered rates and then a little while later you say , well, you can come within those lower rates by firing 38 nurses I guess your position is they should have known it all along but I am not too satisfied with that and I wonder how quickly this can be done and what does it cost to fire 38 nurses?

MR. CICERO: Your HOnor, if they would agree to take the cuts the department gave, we are prepared right now to pay for what it costs till the time of completion and agree to a timetable. That goes for every home, your Honor.

THE COURT: I didn't get your full statement, you are prepared to what?

MR. CICERO: Your Honor, we are prepared to allow a phase out schedule of our suggested cuts.

THE COURT: You are?

MR. CICERO: Yes, sir.

MR. STERN: Your Honor, to give you an idea of the way these cuts were arrived at, we asked because there was a considerable snafu at the meeting, because the suggested cuts with respect to the nursing proved to be erroneous and we demonstrated it when we got there, we said okay, it was erroneous, who made the decision that the state now gets up and says it is going to pay for laying off of 38 nurses, who made the decision to do that?

The woman, Mrs. Teff, who was there, said well, we had a conference call and it was decided. Who decided it? Who wrote there should be eight nurses? Could you tell us so we could address that to the Court. We don't know.

I turned to the lawyer who was chairing the meeting, I said who is it that the state is going to get up in court and tell Judge Griesa? Tell us so we can analyze it.

Was it ever put in writing? Answer no. It was just the result of a conference call between four individuals.

THE COURT: That isn't necessarily bad. People have conference calls every day. The point is, Mr. Stern, look, I wouldn't expect in this setting, I wouldn't expect the most elaborate procedures. I would expect, however, that you aer operating with two groups of people who understand this business sufficiently so that they can intelligently evaluate a problem like this.

I would assume, it doesn't make any difference to me whether they got the information via a conference call or not. The question is, is there merit and I wish you would stop looking at me like I am some kind of a moron. I'm tired of that. I regard it as virtually contempt of court, your conduct and I really will not put pu with it.

MR. STERN: Your Honor, just for the record, your Honor, I do not feel well physically which I have stated to somebody if that has been translated or my attention --

THE COURT: It is not your physical --

MR. STERN: I mean no disrespect, your Honor, and I apologize if that was inferred by you.

THE COURT: All right.

But the question is whether the suggested cut has any merit. You have people of tremendous experience in running nursing homes. Surely they should know whether you can get along with six or seven registered nurses or whether you need 40 to 45. I don't knowthe answer but that is a very big difference. If St. Cabrini says we have to have everyone of our 40 to 45 and the state says you can get along with six or seven and add some practical nurses and if St. Cabrini says we won't even consider any change at all, the door is shut, no change will beconsidered, I am a little worried about that and what I would say is that maybe there is in this case an area of compromise and as far as the phase out we have certainly had some compromise indicated just here. I think that the thing has to be handled in a little different way.

MR. STERN: There is a staffing pattern that St. Cabrini has been operating under for years.

THE COURT: I assume that's right.

MR. STERN: Which has been in the control of the state and which the director of nursing has tried diligently to stay up with, so having developed that staffing pattern under state approval for the state to come and say okay, now, even though we never told you before we would like you to fire 80 per cent of your nurses.

THE COURT: It isn't quite that bad because they are willing to allow you to employ people of lesser status.

MR. STERN: Aides and attendants who according to the registered nurse who was the director of nursing at St. Cabrini and Sister Josephine who is also herself a nurse who explained to the state that that was not adequate for the type of rehabilitation program that St. Cabrini was engaged in.

THE COURT: What rehabilitation program

are you speaking of?

MR. STERN: Mr. Goodwin, the director of nurses indicated that every patient had approximately on the average of six medications that had to be administered under the supervision of a registered nurse, your Honor, and that they engaged in other rehabilitation programs which the nursing personnel at the meeting seemed to understand with respect to their talking to each other about it.

. But the representatives of the Department of Health indicated they had to save the money and therefore the 36 nurses or 38 nurses had to be fired.

We asked whether there was any consideration of the training program that would have to be engaged in even if you radically changed the operations and you brought in aides and attendants and there was no consideration of that.

THE COURT: Let me ask you this, Doctor. We have to come to some solution. We could just go on and on and on. I think, believe it or not, we are getting things narrowed. If you are talking about phase out costs, would you consider this? Agreeing to a payment of the St. Cabrini Home at the old rate from November 1 to the present. Let's just take that.

In other words, therewas no suggestion prior to November 1, and no real opportunity until this moment to talk about these changes so I regard the period of November 1 to the present as almost part of the phase out situation.

I am sorry to have been rough on you, Mr. Stern. You can sit down if you don't feel well. I really regret it. Just take it easy.

Dr. Cicero, back to you. Just seizing on your idea of phase out costs but saying if there is water and extravagance in this situation it should be taken care of. If there is we would all probably agree to that, but you can't turn the clock back and you have to start now and there is still some more work to be done on the St. Cabrini Home. There just hasn't been an agreement.

You say have a hearing, maybe it has come tothat, probably does. Or at least some more discussion. Something has to be done further, if it isn't done now.

Would the state be willingto pay the St. Cabrini at the pre-November 1 rate? At least up until now, which is about mid-December. And also for a further period of time until the matter is resolved and we could work out a mechanics for resolution, maybe I could help, maybe there could be a hearing officer. We could set a very short period of time.

You see, what is beginning to concern me greatly is if I simply put this off further and further and further with no relief to these people pending hearings and discussions, I think the time has been reached where I can't do that.

I think I see very, very clearly here that there are problems that are I think going to require the state to come forward with something whether we call it phase out costs or something, it has just got to be done to take into account the fact that these reductions came into effect with no notice, no suggestion, no mechanics for complying with it.

I think that it is probably desirable to have the pressure on these homes to cut costs to the extent they should.

Therefore, it seems to me maybe a way to achieve it is what I have said to say that restore the rates beginning November 1, restore them up till now and resotre them say for another finite period of time, then if it isn't sort of an indefinite restoration where they can sit back and say "Well, we are home free, we don't have to fire anybody, we can laugh at the state. They are under pressure because they know that the Court is going to come back or somebody is going to come back to them in two weeks, three weeks or something, but at least in the meantime the thing is on some sensible basis.

It is not sensible now, nor can all of this be gone over tonight or tomorrow. It just takes time. There are very serious problems.

Would it be such a terrible cost to the state to take an across-the-board restoration beginning November 1 and continue, say, to January 15? And review it again at that time and work as hard as you can to see the problem cases and get the problems worked out in the meantime?

MR. BRADLEY: Your Honor, could we have a moment before you require Dr. Cicero to respond to that question?

THE COURT: You can have all the time you need, yes. But I hope I am understood. There might even be a recapture provision if it is found that amounts were paid in excess of any rejustified costs. There might be a recapture provision in this that if it is found that the cost reductions were arbitrarily refused and all, there could be a recapture provision.

Let's take a short recess.

MR. STERN: Your Honor, we agree to such a provision, of course.

(Recess)

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DR. CICERO: Thank you for the opportunity to discuss this issue.

Your Honor, may I just ask for one point of clarification?

THE COURT: Yes.

DR. CICERO: I did understand your request of the State. We all think we understand it here, that it applies to St. Cabrini?

THE COURT: No, no. It applies across the board.

DR. CICERO: The State as a whole?

THE COURT: Wait a minute. Let me just give you my reason for this. I am pausing because I am not completely certain of what should be done, Doctor.

In my own thinking about this, I have gone back and forth in my thought process between thinking that we can't give any relief in any event, except on an individual basis. I have thought that at times and then I have thought at times that it is practical to deal with it on an individual basis because if you get into the individual situation, it could take an endless amount of time and that might in itself work its own injustice and hardship.

Furthermore, this has been brought as a class action and one -- although there are some formalities about class action we haven't gone through, one must assume that there is some reliance on this action by the associations and their members.

So I have a lot of things going around in my mind.

I don't really know the situation at all of any homes that have come before me with financial information. I recognize that. That is a problem.

On the other hand, if I don't have information to the contrary, I would presume that in a period of the economy such as ours, which is still generally inflationary, I would sort of presume that when you cut rates, you create some problems. I am putting that in a general kind of a way, because I don't know the details.

When I made the suggestion I did, I was thinking of across the board, and this is the reason, that although I don't know the details of all the homes, I have received some samples and, in any event, there are some common problems.

One, nobody got prior notice of their rate cuts, so that problem is common to everybody.

Secondly, to the extent that someone is cut, that in itself I must assume creates problems as I have said.

I would like to have a device so that there can be some sensible solution to this problem that is both quick and can be carried out, if not tonight, very, very quickly. I think that is in itself desirable.

Secondly, I would like to see a device where we can make use of the knowledge gained but we don't have to just spend immense labor going over case by case hundreds of homes.

That is simply not practical.

DR. CICERO: I couldn't do it. The only way that could be done is to have probably really a number of special masters appointed. If the Court was to take a part, that would involve expense, even that would be unworkable and slow. So to take the five people and give them special treatment I don't think is a very good idea, and to try to deal with everybody individually I think is impractical.

So I really think that we have to do it on a group basis.

There are two possibilities. One is to restore every nursing home's rates to the pre-November 1 rate, that is, on this interim basis. That, I understand, would involve some increases for some people from their current rates and I understand it would involve some decreases, and that is a problem.

Another possibility is to simply restore the rates for the people who have been decreased. Again, maybe not perfectly logical, but it is a way of doing something reasonably quickly that makes some sense, but those are two possibilities.

I discussed that with Mr. Mantzoros, right?

MR. MANTZOROS: Yes, your Honor.

THE COURT: But, in any event, it would be relief broader than just the five or fifteen or whatever number of homes we have dealt with here.

I asked Mr. Mantzoros to find out, and obviously he hasn't been able to, what it would cost the State --

DR. CICERO: We have it.

THE COURT: What are the figures?

DR. CICERO: If we returned to the pre-November 1, 1976 rate for the calendar year 1976, the cost to the State would be an additional approximately $61 million.

THE COURT: Let me make sure what I am hearing.

DR. CICERO: $61 million increased expenditure.

THE COURT: Wait a minute. I don't understand

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what the figures are.

Would this just be for the months of November and December?

DR. CICERO: The full year, your Honor.

$10 million for November and December.

THE COURT: That is what I really think is the area of play here.

In other words, if you returned to the pre-November 1 rates and you paid those pre-November 1 rates for November and December, it would be $10 million?

DR. CICERO: $10 million, your Honor.

THE COURT: That would involve reducing some homes --

DR. CICERO: That would be across the board, your Honor. In other words, every home would get its pre-November 1 rate.

THE COURT: If you returned to pre-November 1 rates only for those homes who have been cut, it would be more than $10 million?

DR. CICERO: Absolutely, yes,sir.

THE COURT: Like what?

DR. CICERO: I don't know what, but you are basically talking about 130 homes that got some increase.

I just don't know, your Honor. I would be misleading the Court even if I told you.

MR. LOWELL: Would you ask Dr. Cicero whether he is including the federal 50 percent?

THE COURT: You are talking about the increased cost to the State?

DR. CICERO: The total cost laid out by the local social service district, which is 50 percent federally reimbursed, 25 percent state and 25 percent local, so the cost to the taxpayers of this state including the local share is 50 percent, 50¢ on the dollar.

THE COURT: So it would be $5 million for the state?

DR. CICERO: For the state and local.

THE COURT: Would there be any problem of getting federal reimbursement?

MR. MANTZOROS: They may not get it from the federal.

DR. CICERO: It may be 100 percent state here.

MR. LOWELL: If your Honor please, the federal government doesn't work on that basis, I am pretty sure.

DR. CICERO: Don't talk for the state, will you, Stanley?

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THE COURT: Wait a minute. I think that would be something we would have to find out, but if it is possible to find it out, in other words, if the federal government made its contribution, I would assume it would, the federal government didn't demand the reduction did it?

MR. MANTZOROS: It did in a way, because of the --

THE COURT: I don't think you can talk about "in a way."

MR. MANTZOROS: They have approved it in August.

Let's find out.

We will find out, your Honor.

THE COURT: If there is a problem, we can get the HEW attorney in here, but let's try to be optimistic.

It is Friday night.

I would ask the plaintiffs' attorneys this: This might really make this palatable. What would your view be about returning to the just pre-November 1 rates regardless of effect, whether it involved a cut?

MR. STERN: Your Honor, the plaintiff associations whom I represent number among their membership, as best as we could document this afternoon, 197 nonprofit facilities are in the New York State Association of Homes for Aging, and 60, at least 60 are in the Hospital Association of New York State. That's 257.

Dr. McCann's affidavit says there are 286 nonprofit residential health care facilities in the state. The boards or the litigation steering committees of each of those two organizations have authorized me to state that I am authorized to agree to your Honor's suggestion that they go back to November 1, if your Honor believes that that would make it more appropriate, and simply restoring the reduced rate.

THE COURT: You are authorized to state on behalf of your clients that there would be an agreement to going back to an across-the-board reduction to the November 1 rates, regardless of the particular effect?

MR. STERN: Right.

THE COURT: How about Mr. Lowell?

MR. LOWELL: If your Honor please, that has been our position from the very beginning.

THE COURT: I think that is right.

MR. LOWELL: With one caveat, and that is that there is the -- I don't know the effect of it, but there is an outstanding order of the Appellate Division, Third Department, and I think your Honor is familiar with

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it, and I don't know what effect it would have with respect to this item. They have argued the case there approximately three weeks ago, and the Appellate Division, Third Department, in that case in their stay said that only those who had gone down would the stay be in effect, but for myself and for the plaintiffs in this case, we would agree with your Honor's suggestion and we would accept an across-the-board provision.

THE COURT: This Appellate Division, Third Department relates to the Whalen case?

MR. LOWELL: K. V. Whalen.

THE COURT: I think that we can work it differently in our case.

MR. LOWELL: That only deals with the retroactivity?

MR. BRADLEY: Your Honor, if I may, one of the plaintiffs in that case is the same plaintiff that Mr. Lowell represents in this case.

THE COURT: It is a different problem. It is complicated,but I can't put all that together.

MR. LOWELL: We do agree to across the board.

THE COURT: I return to this:

I would ask the State to consider returning to the pre-November 1 rates across the board, so returning as of November 1, and agreeing to return to those rates for a period of time in the future, a limited period of time which could be discussed.

I mentioned January 15, but considering Christmas and all, maybe that is a little soon. Maybe it should be through the end of January, another month.

I am not so concerned about that as the principle of the thing. But the principle I have in my mind is this, and I know I am repeating what I have said many times, that this, in effect, remedies the problem of putting these new rates into effect without notice, without the consultation and comment that you are now undertaking. It gives time for situations like the St. Cabrini Home and maybe other situations that can be gone into to be ironed out in not leisurely fashion, but at ;east better than can be ironed out right now.

It remedies any genuine financial emergencies pending an intelligent resolution of the facts, and it does provide relief across the board. It is sort of a rough relief, but either we have to do nothing, which it seems to me is very unsatisfactory, or else we have to have it across the board. I see no possibility of having an individual, case-by-case review at this time. It is just across the board or it is nothing.

Furthermore, I think to treat the five people who have come in here differently, give them special treatment, is impossible. It is grossly unfair.

So I am repeating myself.

Now, at the same time, I think that a simple open-ended restoration of the old rates is wrong, because I am convinced from the State's presentation that the pressure should be on these homes to make all appropriate cost reductions and that is a very, very important consideration, so I think that those different objectives can somehow be reconciled reasonably by having the rights restored for a limited period of time, and exactly what is done in that limited period of time I don't know, but at least there can be more probing of individual cases or illustrative cases, more information gathered than is available right now, which will be of benefit to everybody.

I also feel very strongly that any stay of rates should be accompanied by a provision which I think we referred to as the recapture provision. This may be extremely difficult to administer and maybe it is so difficult that it really won't be practical, but in theory it seems to me it is a good idea to put this added pressure on these homes by saying that if, in cases like St.

Cabrini, after either comment by the State or after knowing of the reductions in November, if somebody arbitrarily sat and kept excess staff on without making any reasonable effort to reduce costs, and kept piling up excessive costs, those excessive costs should be recaptured.

That is probably an extremely difficult thing to administer, but if it is possible to administer it, it seems to me desirable.

One compromise from that would be to state that any cost reductions refused by homes after specific notice by the Department of Health, as in the case of St. Cabrini, can be recaptured after the time of such notice, if the Court finds the reductions were arbitrarily refused.

That probably is the best way to handle it. In other words, if you have gone to St. Cabrini or somebody and you say, "Look, you can reduce; you can do away with thirty registered nurses and replace them with twelve practical nurses," and they simply sit there and simply arbitrarily refuse after you have told them, I wouldn't feel too badly about having them pay that money back to the State, if that had been an arbitrary refusal.

So I would ask you, Doctor, and the attorneys, to consider this, and I must tell you that I think the best way to handle this is by agreement, and I have seen every indication of a really fine attitude on the part of all parties here, despite some heated words now and then, but we can do a lot better job by getting it done by agreement than me entering an order.

It isn't that I don't like to enter orders, but it will be a better job to refine this and reach an agreement, than for me to simply say, "Okay, everything has fallen apart. I will have to enter an order."

But I can pretty much guarantee you that I will enter some kind of an order promptly, because that is where it is leading, and all I want is to have the thing better worked out than if I have to act alone.

I want you to consider that over the weekend and I want to get a report.

When can you have an answer for me? I am talking to the whole State side.

DR. CICERO: Yes, because, your Honor, I would not be able to answer your question right now.

THE COURT: Of course not.

DR. CICERO: So I appreciate your consideration. I would say Tuesday, your Honor.

THE COURT: All right. Let's get together

Tuesday at 3:30.

I am just asking you, is it fair to ask you, Doctor? Is this something that you will consider seriously or is it out of the question? Am I asking something that is out of the question?

DR. CICERO: I don't know, your Honor, because I did come down here with instructions to be able to, after discussion with the Commissioner, be able to say if we had worked out a phase-out period with the homes at notice,that I could agree to that, and that is why I put that forward.

At the same time, I clearly did not have the ability to go for the whole --

THE COURT: Now look, this is a big difference. But it is a big difference in every direction, you see, and I know that it involves a lot more money to take care of 257 homes, or whatever it is, it is a lot more money than taking care of 10 or 15.

But if I were the State of New York, I am not sure I would want to be giving special consideration to 10 or 15.

If you have information indicating that these are the only homes having problems, that would be a wonderful miracle.

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DR. CICERO: I just assumed that; only five sued, your Honor.

THE COURT: But this is a class action.

DR. CICERO: I know.

THE COURT: Well, you consider it, but it isn't just so easy as to say, "Well, these are the only people who have presented financial information; they are the only ones we have to worry about," because I can guarantee you, if any relief is given, we are going to have an avalanche of specific cases.

DR. CICERO: Your Honor, I just want to make sure on the one point that, in any event, this would be a time limited thing, related probably toward the end of January of '77.

THE COURT: I mentioned January 15, but that is impractical.

DR. CICERO: Towards the end of January.

THE COURT: I would say.

DR. CICERO: When something else would happen in this court.

THE COURT: I don't know what the something else would be, but it would simply take care of things in the interim.

MR. BRADLEY: Your Honor, before you close

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the record, may I hand up reports the Department did on the proprietaries?

THE COURT: Mr. Stern, I want to know, have you got information about the situation with the homes, other than the five or so you have presented?

MR. STERN: Oh, yes, your Honor. We have executives from the Associations who have been in contact with the homes throughout the state detailing their plights.

THE COURT: Have they submitted affidavits?

MR. STERN: Do you mean are there more than five homes that are injured?

THE COURT: Yes.

MR. STERN: No, I do not have that. I do have a listing from the State's own records of rates of all those homes whose rates have been reduced and the amount of the reduction.

THE COURT: I think it is much too late to take testimony tonight, but I do think it would be worthwhile, and I think that probably it would be something that would help the State in coming to its decision if you would do this:

If you would get from your people as specific information as they have about any effects of this increase with other homes or generally or what.

Do you understand me?

MR. LOWELL: Your Honor, may I make a suggestion with respect to that? I assume that, under your Honor's very proper suggestion, that we are going to be working out, assuming that Dr. Cicero can agree, that each of the homes would have the responsibility, and I was going to advise everybody in the state that in our case, had the responsibility to come forward and show their figures to the State Department of Health.

THE COURT: For the purpose of having interim relief, you were assuming what?

MR. LOWELL: I was assuming that growing out of your Honor's suggested either consented or anticipated order that every single one of the facilities was going to have the responsibility of going forward and showing what their fiscal situation was.

MR. STERN: You are asking me for something else, your Honor?

THE COURT: I am talking about this.

Dr. Cicero got up and said was I suggesting a reinstatement across the board or was I suggesting -- I am talking about this interim reinstatement, of course -- or was I suggesting an interim reinstatement only for the homes whose specific financial condition had been presented here, the five nonprofits and the ten or so profits.

Dr. Cicero said he was to some degree prepared to reach some agreements on the cases specifically presented, and I said I thought that that is not a way to do it.

What I am getting up to is,as a foundation for any order by this Court or any concession by the State on an across-the-board basis --

MR. STERN: You want to have representative samples?

THE COURT:--it seems to me that there should be something in the record about what is happening to the other homes as a result of these rates.

We probably aren't going to have time to have a lot of detailed testimony about it, but,rather than nothing,I would suggest, Mr. Stern, having your Association clients or whoever you can get, try to construct, and this should be done as realistically and fairly and objectively as possible, have them construct what they know about the picture of what is going on with the homes that aren't specifically portrayed in this case.

You get my point. It is a lot of words to get around.

MR. STERN: I got it.

THE COURT: But let's try to complete the record on that.

But I don't think it will be difficult. These people know the situation. Let's try to get this worked out and get them to Dr. Cicero's office on Monday so that they can be part of this consideration.

Can you do that?

MR. STERN: I will try, your Honor. I do not have other than phone calls saying our rate is reduced and we are going out of business. I don't have the financial data with that kind of information.

THE COURT: Please. I don't expect a lot of detail. I expect if you have people over there who have knowledge because they talk on the phone, they have been around, just embody that knowledge in an affidavit. Don't try to do it home by home, but embody that knowledge just as if they stood up tonight and testified here, but we don't have time for that.

It will be understood that this will not be immensely detailed; it will be understood it is partly hearsay. All of these things are understood, but these people know their industry and they must have some knowledge, and it will be better than hothing. At least I would appreciate having that.

MR. STERN: I understand.

THE COURT: Dr. Cicero, I imagine, would appreciate it and he can evaluate it.

Isn't that right, Dr. Cicero?

DR. CICERO: Yes, your Honor.

THE COURT: Let's leave it at that.

DR. CICERO: Your Honor, may I have one other request?

THE COURT: And the same thing, you have a trade association.

MR. LOWELL: Yes, we do.

THE COURT: Why don't you do that kind of thing?

MR. LOWELL: Fine. If your Honor please, can I just ask a question? There will not be any further testimony on Tuesday?

THE COURT: No, there won't.

DR. CICERO: Your Honor, there is just one other thing that occurs to all of us sitting here.

In your proposition, 130-odd homes the rates would go down, the Association here today has represented on behalf of those 130 homes that they would not object to this. Since we do have some time between now and Tuesday at

3:30, can we have, because I am thinking of another lawsuit, can we have actual representation by each of these 130 in the form of a signed form or whatever it would take, that they agree to take a reduced rate?

After all, they made the representation to the Court here that that is a given, anyway, so it shouldn't be a problem.

MR. MANTZOROS: There is a conflict of interest.

THE COURT: I think it is a problem.

MR. MANTZOROS: Rule 23. This way says it is almost like a compromise and here these problems are without compromise, and they can hit us back without due process.

MR. LOWELL: We are speaking for the Association.

THE COURT: I think this: I could require any questions about this to come before this Court. That is one thing. I think I would have the power. I think my process reaches throughout the State of New York and I think I could have the power to direct that any claims by any members of this class with respect to the premises are to be presented to this Court.

So I don't think you are faced with a spectre of a lot of lawsuits and I think what we have is a good-faith representation on the part of these Associations in an attempt to do something that is fair.

I think if somebody comes in and objects, I will handle that when the time comes.

DR. CICERO: That is fine, your Honor.

MR. STERN: Thank you, your Honor.

- - -

STATE OF NEW YORK
DEPARTMENT OF HEALTH

MEMORANDUM

DEFENDANTS' EXHIBIT X

December 16, 1976

To: Doctor Haughie
From: Doctor Furth
Subject: Loretto Geriatric Center, Inc. - Discussion With Mr. Harper Regarding Issues

1. Facility has made the cuts suggested that represent an annual cost savings of $357,700., which includes termination of the full-time Psychiatrist and one half-time clinical physician.

2. Facility does not feel that having made these cuts in expenditures that irreparable harm will be done to the patients.

3. The facility claims that the application of the 60th percentile ceiling to nursing staff costs for the nursing home and health related facility will not allow staffing to exceed 2.79 hours/patient/day in nursing home and 0.66 hours/resident/day in the health related facility. The facility has submitted information to substantiate a patient need of 3.5 hours per patient per day in the nursing home and approximately 1.3 hours per resident per day in the HRF. Health Department personnel, based upon March, 1976 survey, state that patient needs were 3.5 hours/patient/day in the nursing home and approximately 1.3 hours per resident per day in the HRF.

4. The facility states that the present Medicaid occupancy of the HRF is 91% and the nursing home is 99%.

5. The facility accepts the disallowance in 1976 projected costs of approximately $100,000 because substantial personnel reductions occurred after the cost determinations were submitted.

6. The facility requests that prompt consideration be given to rate appeals for nursing services staffing in the nursing home and health related facility as well as in the area of medical services.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
---------------------------------------X
NEW YORK ASSOCIATION OF HOMES FOR
AGING, INC., et.al., on behalf of :
themselves and all other nonprofit
residential health care facilities :
which render services to Medicaid
sponsored patients, :

Plaintiffs, :

-against- :

PHILIP L. TOIA, as Commissioner of :
Social Services of the State of New York,
ROBERT P. WHALEN, as Commissioner of :
Health of the State of New York,
PETER GOLDMARK, as Director of the :
Budget of the State of New York, and
HUGH L. CAREY, as Governor of the :
State of New York,
:
Defendants.
---------------------------------------X

Pursuant to the instructions of the Court, staff of the New York State Department of Health met with representatives of Loretto Geriatric Ctr., Inc. (hereinafter "the facility") on December 14, 1976. In the course of such meeting the Department's staff advised the representatives of the Facility of its position with regard to proposed cuts in the operational expenses of the facility, and such representatives advised the Department's staff of their views. Following are a Findings of Fact and a summary of the respective views:

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FINDINGS OF FACT:

Facility can sustain rate reductions by making substantial reductions in several areas of operation without causing irreparable harm to patient care. In addition, the findings are:

1. Based upon cost figures submitted for actual operation 1 January - 31 October, 1976, annualized projected cost of HRF operation is $4,756,956.
2. Based upon rate of $31.94, the allowable cost for 1976 HRF operation is $3,963,754.
3. The administrator asked if he would be permitted to depart from the Department's recommended areas for cost reductions, seek his own innovative ways for achieving cost savings while still maintaining his present rating and operating within or at the cost ceilings currently imposed. The Department responded favorably in principle.
4. The reconciliation of the $793,000 presumed difference is based on the Department operational review and the following considerations:
    a. Based on facility's information, 40% of the occupancy of the HRF is not paid by Medicaid, and is assumed to be paid at a rate of $36/day from other sources. The income source other than Medicaid is approximately $220,000.
    b. Estimated cost savings determined by program review - $318,100.
    c. Previously determined non-reimbursable cost - $269,804.
    d. According to information submitted by facility, the current cost of HRF nursing staff is less

than incurred during first part of 1976. The annuallized decrement in actual cost is estimated at $100,000.

Summary

1.	Loss claimed by facility	$793,000
2.	Total reductions proposed by Department	907,904
3.	Total dollar reductions accepted by facility	907,904
4.	Items of disagreement: Facility agrees total cuts. However, wishes to live within rate with their own adjustments and cuts.	

	New York State Department of Health	Loretto Geriatric Center, Inc.
Operational Category	Comments	Comments
Food and Nutrition	1. Reduce waitresses from 20 to 6.	1. Did not accept reduction to 6, but would consider some reduction together with other innovative methodologies to achieve cost reductions.
	2. Pre-select menus.	2. No issue.
	3. Eliminate three diet technicians.	3. No issue.
	4. Eliminate three intermediate food service supervisors.	4. No issue.
	5. Re-examine food delivery system to reduce significant food waste.	5. No issue.
	Total Savings $178,750	
Social Services	Reduce from seven to one the number of individuals with master of social work (MSW) degree, while adding five social work assistants.	Took no issue on reductions; disagreed as to amount to be saved. Stated facility was able to hire MSW at $10,500, and that differential between MSW's and Assistants was $1,500, leaving amount to be saved at $18,000.
	Total Savings $27,000	

	New York State Department of Health	Loretto Geriatric Center, Inc.
Operational Category	Comments	Comments
Rehabilitation Therapies	1. Reduce number of full-time occupational therapists from 4.2 to 1, and add two full-time certified occupational therapy assistants.	1. Took no issue.
Activities Program	2. Reduce activities staff from 11 to 5 by eliminating two coordinators, one secretary and three assistants. Total Savings $64,350	2. Took issue with idea of reducing numbers of highly qualified employees in activities program.
Overall Administration	Overall administrative costs ranked significantly high. Drastic cuts have to be made. No savings amount stated.	No issue.

New York State Department of Health Operational Category	Comments	Loretto Geriatric Center, Inc. Comments
Medical Care	Eliminate psychiatrist and other specialty services. Savings - $48,000, plus cost of undetermined amount of other specialty services.	1. No specialty services currently being provided except for psychiatric services. Facility took issue with elimination of psychiatrist because of position that psychiatrist is essential to overall patient management program.

1608

WORKSHEETS

12/14/76 Meeting

FACILITY: Loretto Geriatric Center, Inc.

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IN ATTENDANCE

DEPARTMENT STAFF	FACILITY REPRESENTATIVES
Steven Steinhardt	
Eleanor Carey	
J. Rodriguez	Syr. R.O.
D. Terry	Cont. Office-Medical-LTC
EDWARD STREET	B.H.F.F. (WSA)
FRANK TURATT	SYR. R.O.
	Rehab Therapies - Central Off
Margaret de Kay	
Louis A. Cirillo	Syracuse R.O.
	Rehab. Therapies Activities
Nancy O'Hara	Nursing Ser. Cons. Syr. R.O.
Ruth Mack, BHSA, SRO	Syr. R.O. Social Wkr
J R Startz	Syr RO Dietician
Linda Laguna	BofFC
FRED WIENER	
BILL GORMLEY	BRRS
DAVE CHASE	"
HANK HIGGITT	"
DAVID J. STERN	NYAHA
[illegible]	Loretto Geriatric Cent

FOOD-NUTRITION

12/14/76

$ 178,750

DEPARTMENT CUT RECOMMENDATIONS

Justification

Testimony (name Linda Lagua Henry Higgitt)

1. Reduce food service waitresses from 20 to 6. Pre-selection of menus. $81,000
2. Elimination of 3 diet technicians. 24,750
3. Elimination of 3 intermediate level food service supervisors. 33,000
4. Re-examine overall food service system and costs. 40,000
    a. Food waste (portions)
    b. Cost of food selection.
    c. Deficit operation of cafeteria-recovery of losses

Documentation $178,750

FACILITY POSITION

JUSTIFICATION

Testimony (name Norman Harper)

1. Disagreed with total amount of reduction. Questioned ability to establish tray service. Questioned his discretion to make less reductions in waitress service while at same time making other innovative changes producing similar savings.
2. No issue.
3. No issue.
4. No issue.

Documentation

UNRESOLVED ISSUES

Disagreement as to total number of waitress reductions.

COMMENTS

SOCIAL SERVICES

1610 12/14/76

$ 27,000

DEPARTMENT CUT RECOMMENDATIONS

Justification

Testimony (name J. R. Sturtz Henry Higgitt)

Reduce number of full-time employees with master of social work (MSW) degrees from 7 to 1; replace 6 of the NSW's with social work aides.

a.	Difference between 5 MSW's and 5 aides ($3,000 each)	$15,000
b.	Elimination of 1 MSW	+12,000
		$27,000

Facility could make these reductions without ffecting rating in this area.

Documentation

FACILITY POSITION

JUSTIFICATION

Testimony (name Norman Harper)

Disagreed on dollars involved. Said MSW was paid $10,500 versus $9,000 paid to aides. Resulting savings would thus be only $18,000.

Documentation

NRESOLVED ISSUES

Amount to be realized in savings from reduction in social work employees.

OMMENTS

REHABILITATION THERAPIES

12/14/76

$ 28,000

DEPARTMENT CUT RECOMMENDATIONS

Justification

Testimony (name Louis A. Cirillo)

Reduce from 4.2 to 1 the number of full-time occupational therapists and replace with 2 full-time assistants.

Saving from eliminating occupational therapists	$45,000
Cost of adding assistants	-17,000
Net Savings	28,000

Documentation

FACILITY POSITION

JUSTIFICATION

Testimony (name Norman Harper)

No issue

Documentation

UNRESOLVED ISSUES

None.

COMMENTS

LEISURE-TIME ACTIVITIES

12/14/76

$ 64,350

DEPARTMENT CUT RECOMMENDATIONS

Justification

Testimony (name Louis A. Cirillo)

Reduce number of activities staff from 11 to 5.

2 Coordinators	$24,200
1 Secretary	8,800
3 Assistants	31,350
Total Savings	$64,350

Documentation

FACILITY POSITION

JUSTIFICATION

Testimony (name Norman Harper)

Took strong issue with this reduction. Says facility searched extensively for highly qualified activities program personnel. Said reduction of numbers of highly qualified personnel would be devastating to HRF.

Documentation

UNRESOLVED ISSUES

Whether Activities Program could be run with reductions as proposed.

COMMENTS

ADMINISTRATION AND GENERAL

1613 12/14/76

$__________

DEPARTMENT CUT RECOMMENDATIONS

Justification

Testimony (name David Chase
Dr. Frank Furth
James Tunny)

Overall administrative costs are excessively high; there is need to make drastic reductions. Facility is ranked number one in area of administrative costs with regard to facilities of comparable size. No specific reductions proposed, but significant amounts can be realized.

Documentation

FACILITY POSITION

JUSTIFICATION

Testimony (name Norman Harper)

Acknowledged need to reduce costs in this are

Documentation

UNRESOLVED ISSUES

Exact dollar amount and specific areas to be cut.

COMMENTS

MEDICAL CARE

$ 48,000

1614 12/14/76

DEPARTMENT CUT RECOMMENDATIONS

Justification

Testimony (name Dr. Frank Furth)

All non-specialty services should be placed on fee-for-service basis. Not necessary to maintain salaried staff to provide these services.

Savings $48,000

Documentation

FACILITY POSITION

JUSTIFICATION

Testimony (name Norman Harper)

No specialty services are currently being provided except for psychiatric. Took issue with proposal to eliminate psychiatrist position, stating psychiatrist is essential to overall management of patient program.

Documentation

UNRESOLVED ISSUES

Replacement of psychiatrist by comparable community resource on fee-for-service basis.

COMMENTS

MEDICAL CARE

$________

1615 12/16/76

DEPARTMENT CUT RECOMMENDATIONS

Justification

Testimony (name____________)

Paying Medical Director $53,000/year
Facility claims:

$42,000 + Salary
11,000 fringes package

Fringes should be shown as fringe benefit and would not apply to the current $40,000 ceiling for Medical Director's salary.

Documentation

None

[illegible]

FACILITY POSITION

JUSTIFICATION

Testimony (name____________)

Accepts.

Documentation

UNRESOLVED ISSUES

COMMENTS Facility claims they plan to terminate the two physicians (admission and annual examination physician and the psychiatrist).

12/16/76

REGISTERED NURSES, AIDES, AND ATTENDANTS

EPARTMENT CUT RECOMMENDATIONS

ustification

Testimony (name______________)

The 1976 statement annualized included $907,785 for nursing in the HRF.

The cost shown on the appeal for nursing showed $804,941. Our position therefore is that the actual level of nursing in the HRF is $804,941 due to reductions already made for a net savings of $100,000.

Documentation

$HRF

FACILITY POSITION

JUSTIFICATION

Testimony (name______________)

Accepts.

Documentation

UNRESOLVED ISSUES.

None

COMMENTS

1617 12/16/76

DEPARTMENT CUT RECOMMENDATIONS

Justification

Testimony (name ____________)

Private Pay Patients - Since 40% of the residents in HRF are other than Medicaid, the income from those residents has to be considered in the calculation of loss.

Documentation

FACILITY POSITION

JUSTIFICATION

Testimony (name ____________)

Facility claims if a patient or resident was private pay for any part of the year, they we listed as private pay.

Claims currently only two patients in SNF are private patients, and only 31 of ICF patients are private pay. (1.6% SNF patients and 9% of HRF patients)

Documentation

RESOLVED ISSUES

Extent to which private patient income may be used to offset operating expenses of facility would depend on current private patient population which facility states is less than that estimated by Department.

COMMENTS

LORETTO
GERIATRIC
CENTER

DEFENDANTS' EXHIBIT X-1

Executive Office

December 15, 1976

Frank W. Furth, M.D.
Assistant Regional Health Director
NYS Department of Health
677 S. Salina Street
Syracuse, New York 13202

Dear Dr. Furth:

The purpose of this letter is to report our action subsequent to the cost reduction discussions of Tuesday, December 14, 1976.

We have implemented the following actions:

1. Activity Division

   The 11 person Activity staff has been reduced to 5.

   Annual Savings: $34,241

2. Social Services Division

   The 8 person Social Services staff has been reduced to 6.

   Annual Savings: $26,026

3. Occupational Therapy Department

   The 5 person Occupational Therapy staff has been reduced to 1.

   Annual Savings: $49,035

700 East Brighton Avenue, Syracuse, New York, 13205
Area Code 315-469-5561

4. Dietary Division

   a. 3 Kitchen Supervisors have been eliminated.

      Annual Savings: $31,688

   b. The option of selecting desired entree and dessert at time of sitting has been eliminated.

      Annual Savings: $0

   c. 3 Diet Technicians have been eliminated.

      Annual Savings: $30,086

   d. The 20 person waitress staff has been reduced to 13. We note that this staff of 13 people appears to be minimum coverage for three meals a day, seven days a week for our 144-seat dining room.

      Annual Savings: $43,636

   e. The Volunteer Department will no longer be given complimentary meals.

      Annual Savings: $3,600

   f. Cafeteria prices have been increased to reflect food, personnel and overhead costs.

      Annual Savings: $28,800

   g. Additional costs of part-time personnel, paper goods and other miscellaneous items have been reduced to bring our dietary costs to the "good State" dietary ceiling.

      Annual Savings: $77,000

5. Administrative

   Miscellaneous staff and supply reductions have been implemented to bring administrative expenses down to or below the appropriate ceiling for "good State".

The above cuts amount to annual savings of approximately $291,712. However, as repeatedly emphasized, our major problem remains in the area of Nursing. The present "good State" ceiling authorizes a nursing cost per day of $16.10, or, per year, of $126,000.37. This authorization will buy 2.79 nursing hours per patient day. The present Loretto staffing pattern is 3.2 nursing hours per patient day for a per diem of $18.46 or per annum of $1,176,667.

If Loretto is asked to maintain staffing at this 3.2 level, an exemption from the ceiling of $2.36 per diem or $150,630 per annum must be granted. The Central Regional Office has identified a staffing need at Loretto of 3.5 nursing hours per patient day. This coverage would cost $20.19 per day or $1,286,688 per year. If we are to staff at the 3.5 level, a ceiling exception of $4.09 per day or $260,651 per year must be authorized.

The unreasonableness of the "good State" ceiling for Nursing is also an issue for the Intermediate Care Facility. The published ceiling is $4.14 per day or $498,361 per year. This will buy .66 nursing hours per patient day. The current Loretto staffing at 1.32 as recommended by the Regional Office costs $8.32 per day or $1,001,536 per year. Therefore, based on current staffing, we are over ceiling by $4.18 per day or $503,175 per year.

The other unresolved hardship is in the area of medical doctor staffing. The enclosed sheet, as presented to you on Tuesday, December 14, demonstrates this problem.

In conclusion, we have immediately responded to all suggested cost reductions with the major problems of Nursing and Medicine still unresolved. Loretto must receive a waiver from the ceilings or reduce Nursing and Medical staff as discussed above.

Sincerely yours,

Norman E. Harper
Executive Vice President

Enc.
NEH:aml

LORETTO GERIATRIC CENTER

Summary of M.D. Problem

I. Reported: 1975

A. SNF	84,236
B. ICF	142,608
	226,844

II. Allowed: Proposed 1976

A. SNF	32,400
B. ICF	20,400
C. Medical Director	40,000
	92,800

III. Need: 1977

A. SNF	36,000
B. ICF	36,000
C. Admission and Annual	17,500
D. Psychiatrist	48,000
E. Medical Director	53,000
F. U.R. and Employee Health	15,000
	205,500

LORETTO GERIATRIC CENTER

Nursing Service Staffing Component
Skilled Nursing Facility

(3.5)

	7-3	3-11	11-7
HN	1		
RN	3	3	1
LPN	3	2	1
NA	6	4	3
Clerk	1		

	Per Annum	Per Diem
Cost*	1,286,688	20.19
Ceiling (GS)	1,026,037	16.10
Difference	(260,651)	(4.09)

(3.2)

	7-3	3-11	11-7
HN	1		
RN	3	2	1
LPN	2	2	
NA	6	5	3
Clerk	1		

Cost*	1,176,667	18.46
Ceiling (GS)	1,026,037	16.10
Difference	(150,630)	(2.36)

Net difference

	7-3	3-11	11-7
HN			
RN		-1	
LPN	-1		-1
NA		+1	

*All costs include fringe benefits.

LORETTO GERIATRIC CENTER

Nursing Service Staffing Pattern Options
Health Related Facility

Present level (1.55)

	7-3	3-11	11-7
HN	1		
RN	1		
LPN		1	.25
NA	3	2	1
Clerk	1		

	Per Annum	Per Die
Cost*	1,176,083	9.77
Ceiling (GS)	498,361	4.14
Difference	(677,723)	(5.63)

New level (1.35)

	7-3	3-11	11-7
HN	1		
RN	1		
LPN		1	.25
NA	2	1.5	1
Clerk			

Cost*	1,001,536	8.32
Ceiling (GS)	498,361	4.14
Difference	(503,175)	(4.18)

Net difference

	7-3	3-11	11-7
HN			
RN			
LPN			
NA	-1	- .5	
Clerk	-1		

*All costs include fringe benefits.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

DEFENDANTS' EXHIBIT Y

---X

NEW YORK ASSOCIATION OF HOMES FOR :
AGING, INC., et.al., on behalf of
themselves and all other nonprofit :
residential health care facilities
which render services to Medicaid :
sponsored patients,

Plaintiffs, :

-against- :

PHILIP L. TOIA, as Commissioner of :
Social Services of the State of New York,
ROBERT P. WHALEN, as Commissioner of :
Health of the State of New York,
PETER GOLDMARK, as Director of the :
Budget of the State of New York, and
HUGH L. CAREY, as Governor of the :
State of New York,
:
Defendants.

---X

Pursuant to the instructions of the Court, staff of the New York State Department of Health met with representatives of St. Cabrini Nursing Home, Inc.(hereinafter "the facility") on December 14, 1976. In the course of such meeting the Department's staff advised the representatives of the Facility of its position with regard to proposed cuts in the operational expenses of the facility, and such representatives advised the Department's staff of their views. Following are a Findings of Fact and a summary of the respective views:

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FINDINGS OF FACT:

Department recommended that the facility make cuts as indicated above and summarized below:

	1974 Expenditure Level	Suggested Cost	Savings
Nursing Administration	$145,000	$145,000	--
Registered Nurses	641,000	96,000	$545,000
LPN's	--	153,600	(153,600)
Aides & Attendants	530,000	731,000	(201,000)
Food - Nutrition	463,000	415,000	48,000
Cleanliness & Safety	426,000	349,000	77,000
Social Work	34,000	20,000	14,000
Administration	343,000	190,000	153,000
	$2,582,000	$2,099,600	$482,400
	1975-1976 Trend Factor 1.1810		
	Cost which is representative of the savings that can be achieved in 1976		$569,714

The Department maintains that these cuts will not cause irreparable harm to patients.

Summary

1. Loss claimed by facility	$478,472
2. Total reductions proposed by Department	$569,714
3. Total dollar reductions accepted by facility	None
4. Items of disagreement	Total Department Proposal

New York State Department of Health		St. Cabrini Nursing Home Inc.
Operational Category	Comments	Comments
Nursing Administration	There are presently 7.8 employees in this area accounting for $145,000 in salaries. The Department recommends 7.8 employees at $145,000. (See Exhibits A & B)	No issue remains.
Registered Nurses	Department recommends reduction of from 40-45 RN's to 6.4 and the addition of 12.8 LPN's amounting to a saving of $391,400. Part of this saving will be offset by increase in aide and attendant coverage.	

	New York State Department of Health	St. Cabrini Nursing Home, Inc.
Operational Category	Comments	Comments
Aides and Attendants	Present aide salary expense of $530,000 to be increased to $731,000 by bringing total number of aides employed to 80. An increase of $201,000 in salary expense. Department saving: combining "Registered Nurses" and "Aides and Attendants" categories = $190,400.	
Administration General	Department recommends a reduction in the expenditure level from $343,000 to $190,000 which results in a savings of $153,000. The $190,000 level can be achieved by the following:	Administrator is paid $31,806

New York State Department of Health			St. Cabrini Nursi Inc.
Operational Category	Comments		Comments
Admin. (cont.)	administrator's salary	$30,000	Contest salary le Claims 1976 costs .951 in
	1 controller	20,000	administration bu does not
	4 bookkeepers @ $10,000	40,000	include controll eeping,
	2 clerks @ $7,500	15,000	personnel and pu functions.
	2 secretaries @ $7,500	15,000	
	Services purchased from affiliated hospital	70,000	
	Total proposed admin. costs	$190,000	

	New York State Department of Health	St. Cabrini Nursing Home, Inc.
Operational Category	Comments	Comments
Cleanliness	Housekeeping salary expenses can be reduced from present level of 125,300 to 114,000. Sufficient staffing would consist of: 1 supervisor 10,000 13 maids 104,000 Reduction represented 11,300	Contests salary levels and staff reduction. Stated that each employee performs necessary task.
	Maintenance salary expense can be reduced from present level of 126,500 to 93,000. Sufficient staffing would consist of: 1 chief engineer 19,000 4 maintenance men 44,000 1 general maintenance man 10,000 2 security guards 20,000 Reduction represented 33,500	Contests salary levels and staff reduction.
	Laundry & linen expense can be reduced from 88,400 to 68,200. Reduction represented 20,200	Contested industry average submitted by Department of $1 per day

	New York State Department of Health	St. Cabrini Nursing Home, Inc.
Operational Category	Comments	Comments
Cleanliness & Safety (cont.)	Repair-maintenance expense can be reduced from 67,200 to 52,000, a reduction of 15,200. Actual 1975 expense amounted to $44,700	Questioned Department's knowledge of physical plant and complexity of machinery
Food and Nutrition	Facility is spending $4.72 per patient day on food related costs (exclusive of raw food costs). The industry average is $3.98 per patient day. Department suggests a reassessment of the numbers & types of personnel employed as well as salary levels in order to reduce the 54¢ excessive costs. Such a reduction would effect a savings of $48,000.	No comment
Social Services	Social work costs can be reduced from cu [illegible] 34,000 to 20 [illegible] limination of 1 [illegible] gree social wo [illegible] gested [illegible] degree [illegible] 12,000 and [illegible] aide at	1. Disputed salary levels 2. Facility noted that they had received instructions from NYSDH to add a secretarial position because of their complex record keeping system. 3. Facility stated length of stay at Cabrini is shorter than

Exhibit A

St. Cabrini Nursing Home

Staff, in performing their analyses of nursing administration and nursing services of St. Cabrini, overlooked several sources of information and erred in their interpretations of such data as were used. The original staff report and recommendations thus misinformed Deputy Commissioner Doctor Cicero and, in turn, the Federal District Court and the facility -- particularly in regard to staff analysis of and advice on nursing administration.

These errors and misinterpretations have been corrected. Current evaluation indicates that the facility's nursing services administration budget should remain at or near its previous levels but that major reorganization is necessary. The proposed reorganization should lead to more effective direction of the nursing services, better supervision of nursing services and much more cost effective provision of nursing services.

With minor modifications, the Department's recommendations for reorganizing the direct care nursing services will produce significant savings, improve nursing care of patients, allow the facility to retain its "Good-State" rating in nursing and provide nursing care more efficiently and effectively.

NURSING ADMINISTRATION

	Our Report	Actually Had	Proposed
Director	1	1	1
Asst. Director	3	1	1
Inservice Education Coordinator	1	1	
Relief Factor		.8	
Sub Total	5	3.8	2
Secretary		1	1
Supervisor	3	2	3
Relief Factor		1	1.8
Sub Total	3	3	4.8
Total	8	7.8	7.8
RN	44.4	40-45	6.4
LPN	0	0	12.8
Aide	58	52-60	80
Ward Clerk		2	2

		Proposed	Previous
Costs	RN's	96,000	641,000
	LPN's	153,600	530,000
	Aides	731,000	
		980,600	1,171,000

Suggested Reduction: 190,400

PLEASE PRINT
your NAME below 1633
your SIGNATURE

NAME	Title	NYSDH	Facility	othe (identi
BERT FISCHER	Asst. Administrator		St Cabrini Nursing Home	
Sister Josephine Tsuei	Administrator		Cabrini Health Care Ce	
yllis S. Goodwin	Dir. of N.O.		Cabrini Health Care Center	
LVATOR LAMPIASI	Acting Administrator		St Cabrini N.H.	
VID J. STERN	Attorney - NYAHA			
OVIEL J. RINALDI	Director BHS Health Dept			
th E. Simpson	Consultant Bur of H.N. Services			
ecnie Stian.	Consultant Physical Therapist Health Dept			
nifred O'Callaghan	Health Program Administrator			W. PRO
LAN MARSHALL	MTGE. ADMIN.	NYSDH		
rnee Friedman	Public Health Sanitarian, NYSDH			
linann Reynolds	Director, Social Work, NYS Health Dept.			
THONY FLAHERTY	Hospital Nursing Services Consultant			W.P.R.O. NYS
ictoria J. Tuff	Regional Hospital Nursing Service Administrator			W.P.R.O. NY
ELIZABETH M. LUND	REGIONAL P.H. NUTRITIONIST			WPRO-NYSD
Mindaugas Jatulis	Associate Engineer, Bur Fac. Env. Control			NYSD
EGINALD MALONE	H.P.A	NYSDH		
W. Foley	Attorney	" "		

NURSING ADMINISTRATION

1634 12/14/76

PARTMENT CUT RECOMMENDATIONS

stification

Testimony (name V. Tefft)

rsing Administration:
ility presently sustains administrative
sing staff: 1 director
1 assistant director
1 in service education co-ordinator

elief factor of	.8	
	1	secretary
	2	nursing supervisor
elief factor of	1.0	
al	7.8	

department proposes the following level
staffing:

	1	director
	1	assistant director
	1	secretary
	3	nursing supervisors
elief factor of	1.8	
	7.8	

reduction of present level of 145,000

FACILITY POSITION

JUSTIFICATION

Testimony (name_____________)

Documentation

NRESOLVED ISSUES

COMMENTS

REGISTERED NURSES

12/14/76

1635

DEPARTMENT CUT RECOMMENDATIONS

ustification

Testimony (name V.Tefft)

R.N. Staffing
acility employs 40-45 registered nurses

t is recommended that the facility employ .4 registered nurses. The facility does not mploy licensed practical nurses. It is ecommended and proposed that the facility mploy 12.8 LPN's.

his combination of RN's and LPN's would provide an acceptable level of care and greatly educe costs.

ost of 6.4 R.N.	96,000
ost of 12.8 LPN	153,600
epresenting a total of	249,600
reduction of	391,400

FACILITY POSITION

JUSTIFICATION

Testimony (name ____________)

Documentation

UNRESOLVED ISSUES

COMMENTS

12/14/76

AIDES AND ATTENDANTS

EPARTMENT CUT RECOMMENDATIONS

ustification

Testimony (name V. Tefft)

he facility presently employs 52 to 60 aides and ttendants at a cost of $530,000. It is proosed that the facility employ 80 aides at a cost f 731,000.

uch aide coverage would result in a cost of 31,000 representing an increase of 190,400.

he combination of the cost savings resultant rom the registered nurse and licensed practical urses schedule and the increased costs attributed o aide coverage would yield a combined cost eduction figure of $190,400.

Documentation

FACILITY POSITION

JUSTIFICATION

Testimony (name __________)

Documentation

UNRESOLVED ISSUES

COMMENTS

1637 12/14/7

$ 190,000

DEPARTMENT CUT RECOMMENDATIONS

Justification

Testimony (name D. Rinaldi)

urrent Costs	Suggested Costs	Savings
343,000	190,000	153,000

estimony by Mr. Rinaldi:

ndustry average expense per patient day is 2.34 per patient day cost for this facility s $5.07. On basis of 68,178 patient days the .07 figure represents an excess annual expens of 186,000

Recommendations:

1. Reduce administrators salary from 40,000 to 30,000.
2. Recommended administrative staff for this facility:

1 controller	-20,000
4 account./ bookkeepers	-10,000 each
2 clerks at	- 7,500 each
2 secretarys	- 7,500 each
Suggested Business office costs	90,000

Based on submitted info. 236,000 is used to purchase services from affiliate hosp. It is suggested that facility review and make necessary adjustments to allocation of costs between nursing home and hospital to reflect actual administrative expenses of nursing home. Based upon industry norms, proper allocation of remaining nursing home administrative expenses should not exceed $70,000.

FACILITY POSITION

JUSTIFICATION

A. Fischer-Asst.Controller
Phyllis S. Goodwin
Sister Josephine Tausi-Admin.

Testimony (name David Stern,) Atty.

Administrator now paid 31,806

Documentation

1. Contest salary levels
2. Contested suggested staffing said they need existing level which includes:

1 administrator	31,806
secretary	7,482
secretary	9,385
clerk/typist	10,000
switchboard	10,355
switchboard	9,055
Dir. of Volunteers	11,956
Receiving Clerk	10,[illegible]
Pastoral Co-od.	7,200
Total	107,951 -- 1976

Stated that above figures exclude controller, all bookkeeping, personnel and purchasing functions.

COMMENTS

CLEANLINESS AND SAFETY

77,000

EPARTMENT CUT RECOMMENDATIONS

ustification

Testimony (name M. Jatulis)

rrent Costs	Suggested Costs	Savings
26,000	$349,000	$77,000

isting costs detailed in HE-2

usekeeping salaries	125,300
usekeeping supplies	8,600
undry & linen	88,400
pair & main. salaries	126,500
pair & main.	67,200
neral	

commendations made by Mr. Jatulis
- decrease numbers of staff
- decrease salaries of staff
- decrease cost of laundry services and repair & maintenance expenses

ecific Recommendations:

isting housekeeping staff	15.1
ggest	14
isting maint. staff	7.4
ggest	6
isting security	2.4
ggest	2

isting maintenance salaries	126,500
ggested staffing	
1 chief engineer	19,000
4 maintenance @ 11,000 each	44,000
1 general maintenance man	10,000
2 security guards @ 10,000	20,000
tal recommended maintenance laries	93,000
presents reduction of	33,500

isting housekeeping salaries	125,300
ggested	
supervisor	10,000
maids @ 8,000	104,000
Total	114,000
duction represented -	11,300

undry & Linen services	
isting costs:	88,40
ggested costs:	68,2

reduction is based on ost of
r patient da
duction r

FACILITY POSITION

JUSTIFICATION

Testimony (name ____________)

D. Stern
A. Fischer - Asst. Controller
Sister Josephine Tsuei - Admin.
Phyllis S. Goodwin
Salvator Lampiasi

Contest salary levels

States that each employee performs a necessary task.

Contests $ 1 per patient day computation.

1639 12/14/76

CLEANLINESS AND SAFETY

$ 77,000

DEPARTMENT CUT RECOMMENDATIONS

Justification

Testimony (name M.Jatulis)

CONTINUATION

Repair and maintenance expense

existing expense:	67,200
recommended expense:	52,000
reduction represents	15,200

justification: New building should present minimal expense; in actuality maintenance expense for 1975 as reported amounted to $44,700. Tota

...

Total reduction in costs: $80,200

FACILITY POSITION

JUSTIFICATION D.Stern, A.Fischer-Asst.Contro
Sister Josephine Tsuei-Admin.

Testimony (name ____________)
Phyllis S. Goodwin, Salvator Lampiasi

Questioned whether department has personal knowledge of physical plant; stated that the department does not allow for the complexity, attendant maintenance expense of the equipment in this new facility.

Documentation

18

1640 12/14/76

FOOD AND NUTRITION

48,000 savings

EPARTMENT CUT RECOMMENDATIONS

ustification

Testimony (name Mrs. Lund)
Nutritionist, WHRO

rent costs	Suggested Costs	Savings
63,000	415,000	48,000

get submitted to the Department in '73 timated 245,775 costs for dietary dept.; refore, current costs exceed what was posed by approximately 217,000. The ggested cut of 48,000 is much less than the 7,000 difference.

y food cost of 2.07 per patient day is ceptable to the Department. Total food lated cost per day is $6.79--the average is 5.08. The difference between 6.79 and 2.07 st be attributed to other food related penses that amount, 4.71 is excessive. The epartment suggests that the facility re-- valuate the number of dietary workers employe nd/or the salaries paid.

FACILITY POSITION

JUSTIFICATION

A. Fischer-Asst.Controller
Phyllis S. Goodwin
Sister Josephine Tousi - Admin.

Testimony (name David Stern .)Atty.

The facility had no comment on the State's position.

Documentation - None

UNRESOLVED ISSUES

Because the facility offered no statement and asked no questions on this area, the state must consider the issue unresolved.

COMMENTS

28,000

1641 12/14/76

DEPARTMENT CUT RECOMMENDATIONS

Justification

Testimony (name E. Reynolds)
Director, Public Health S.W.

rrent Costs	Suggested Costs	Savings
$34,000	20,000	

proper staffing pattern in Social Services.
r a 200 bed facility, only 1 masters degree
cial worker and 1 social work assistant is
eded. A MSW can do consultation, supervis-
n, intensive casework service where needed.

cial work assistant can take part in the
itting process, interview patients and
ilies, social assessments, referrals, plans
discharge.

Documentation - None

FACILITY POSITION

A. Fischer-Asst. Controller
Phyllis S. Goodwin
Sister Josephine Tesei-Admin.

JUSTIFICATION

Testimony (name D. Stern) Atty.

1. Facility felt the 20,000 was not a reasonable figure for the two positions.

2. Facility noted that they had received instruc
ions from NYSDH, to add a secretarial position because of their complex record keeping system.

3. Facility stated that the length of stay in St
Cabrini is shorter than the average facility.

Documentation - None

NRESOLVED ISSUES

e comments from the facility indicate that they do not concede any issues. All areas are
erefore unresolved.

OMMENTS

e facility's selective admissions policies and emphasis on short term patients with
habilitation potential results in a high number of discharges.

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

- x

NEW YORK ASSOCIATION OF HOMES FOR :
AGING, INC., et al., 76 Civ. 5113
Plaintiffs, : 76 Civ. 5233
vs. 76 Civ. 5320
PHILIP TOIA, et al., :
Defendants.

- x

NATHAN KLUGER, et al.,
Plaintiffs, :
vs.
PHILIP TOIA, et al., :
Defendants.

- x

N.Y. STATE HEALTH FACILITIES
ASSOCIATION, et al., :
Plaintiffs,
vs. :
PHILIP TOIA, et al.,
Defendants. :

- x

December 21, 1976,
3:40 P.M.

Before:

Hon. Thomas P. Griesa,
District Judge.

Appearances:

PROSKAUER, ROSE, GOETZ & MENDELSOHN, ESQS.,
Attorneys for New York Association of Homes for Aging, Inc.,
David J. Stern, Esq., and
Jeffrey A. Mishkin, Esq., of Counsel.

LOWELL & KARASSIK, ESQS.,
Attorneys for plaintiff New York State Health Facilities Association,
Richard Brenner, Esq., of Counsel.

Appearances:

LOUIS J. LEFKOWITZ, ESQ.,
Attorney General, State of New York,
George C. Mantzoros, Esq.,
Charles A. Bradley, Esq.,
Assistant Attorney Generals, State of New York.

THE COURT: Can I have a response to the proposal made?

MR. MANTZOROS: Yes, your Honor.

If your Honor please, pursuant to this court's request last Friday, the representatives of the defendants who were present have conferred not extensively -- this is information I received by telephone -- and last night again they all met again at the Capital and went over the whole situation. I am advised, and pursuant to the overall picture, that because of what purports to be affirmative action -- this is not just a status quo type of preliminary injunction -- insofar as it does provide for affirmative action which may be in the nature of another type of retroactivity, if not the same as the other retroactivity, that they are unable to consent and waive 11th Amendment and other defenses that have already been asserted and this court denied. So that may have to be asserted on an appeal.

THE COURT: You are talking about two different things.

MR. MANTZOROS: I have to because I can't waive the 11th Amendment.

THE COURT: Nobody is waiving.

MR. MANTZOROS: We are.

THE COURT: Dr. Cicero came in last week and said that he was prepared to make concessions as to particular homes. So if there is some legalistic principle that was involved which would block a consent, that would have applied equally to the matter of the individual homes as to broader relief. This is just not a sensible response. It is not a sensible response. I do not accept it as a response.

MR. MANTZOROS: I have a duty as an attorney.

THE COURT: Where is your principle?

MR. MANTZOROS: I am inviting this Court's attention to these defenses that are available to the defendants.

Now, this is what he may be referring to. As of January 1st, as I said, there are new rates. Dr. Cicero has bronchitis.

THE COURT: Who is here in his place?

MR. BRADLEY: Dr. Toff.

MR. MANTZOROS: Dr. Cicero knows the facts and he has bronchitis.

THE COURT: I want to hear from Dr. Toff. I want him to go on record as being adamantly opposed to any adjustment. I think that is irresponsible and I want them to go on record, and there is no legalistic argument that you are mentioning which is the slightest excuse for not considering a sensible adjustment.

MR. MANTZOROS: May I take exception to your comments because that is not correct and they have met and I as counsel have a job to do and I am doing it.

THE COURT: Okay.

MR. MANTZOROS: This Court can enter a preliminary injunction. There is no necessity for forcing consent.

THE COURT: What do you mean?

MR. MANTZOROS: You asked us to consider whether they can consent. How can they consent?

THE COURT: You simply fail to understand. and if that is the thing you conveyed you did not convey it correctly. If I entered a preliminary injunction, the standard preliminary injunction would be to restrain something pending the outcome of the trial of this case. That would be an indefinite period of time because I don't know when the trial of this case would occur. I suggested a proposal which would be short of a preliminary injunction in that it would be of a very finite duration and it would involve the reinstatement of rates not by way of injunction, because I wouldn't enter a preliminary injunction in that way. I suggested the working out of a method by which there could be some interim relief to these people because of basically a failure of procedural due process. Now, we spent hours and hours arriving at some kind of what I thought, at least, was a sensible proposal and I didn't have anybody stand up to me at that hearing and say "We simply won't consider it because of some legalistic things."

To come back and say that you will not agree to anything and not even come back with any counter proposal and to tell me that it is all because of the 11th Amendment and certain things you are afraid to waive simply is not sensible. It is not sensible. We are far past that kind of a discussion. We were past that kind of a discussion three sessions ago. I want to hear from the Department of Health. Who is here?

MR. MANTZOROS: Even on that interim period there is affirmative action in restoring the pre-November 1st rates.

THE COURT: What do you mean the pre-November 1st rates?

MR. MANTZOROS: If your Honor enjoined the present rates there is a vacuum. You would have to be restoring then the pre-November 1, 1976, rates.

THE COURT: You are talking in legalistic terms. I am talking in practical terms.

MR. MANTZOROS: The practical terms are all intertwined, if your Honor please. It does involve that.

THE COURT: I can't believe my ears to hear this kind of response.

MR. MANTZOROS: Why are counsel being criticized for doing their job to the best of their ability? Last Friday we took the whole matter into consideration and discussions went on. The man has bronchitis.

THE COURT: You are talking about affirmative action and 11th Amendment. I think that is completely senseless.

MR. MANTZOROS: It is true. It is affirmative action. It is not status quo.

THE COURT: That is a label.

MR. BRADLEY: Your Honor, I am sure that the department in its consideration was looking at the matter on the merits and trying to determine whether or not it could in conscience waive its rights, what it believes are its rights, to promulgate these regulations.

Now, in the first place, as your Honor well knows, some of the rates -- many of them -- also went up. They didn't all go down. There is a new rate being promulgated to be effective the 1st of January which increased those rates. They have been computed to increase those rates for the period January --

THE COURT: Have I been advised of that up to this moment?

MR. MANTZOROS: Yes, in part. I was more specific because they were in promulgation. Although they are not in writing now it is due to go out in writing.

THE COURT: Have I been advised of this?

MR. MANTZOROS: That is what I tried to advise your Honor. I had advised the change in rates for January 1st.

THE COURT: If you had advised me of one I should not have interrupted.

MR. MANTZOROS: I was advised around noon today by Mr. MacHarg. I called him back to get more specifics. As I understand it, as of January 1st there is supposed to be a 5 percent-plus --

MR. BRADLEY: Excuse me. It is between 4 and 5.

MR. MANTZOROS: Between 4 and 5 percent which is what they call the trend factor which takes other costs, inflation and other things, into consideration. With these rates as they now stand, there is this additional 4 to 5 percent.

THE COURT: Will that be across the board?

MR. BRADLEY: Your Honor, it will apply to the rates as promulgated and it will be basically across the board. Those rates have been presented to Budget now and if Budget approves, we expect that they will, they will go into effect January 1st.

One other problem, if I may, your Honor--

THE COURT: Let's take a given case and see what it would do.

MR. MANTZOROS: It will raise the 4 percent on the November 1, 1976, base.

THE COURT: Let's take St. Cabrini.

I hope these figures are right. There have been some revisions but I think the rate before November 1st was $62.51. The new rate as of November 1st is $55. Now let's say that we have a 4 percent increase. You say we add 4 percent of 55, right?

MR. BRADLEY: That's correct.

THE COURT: What would that be?

MR. MANTZOROS: About $2.75; between $2.25 and $2.75, your Honor.

THE COURT: In other words, if it was 4 percent actually it would be an increase of $2.20 per day; if it was 5 percent it would be $2.75 a day.

MR. MANTZOROS: This has been sent to Budget, if your Honor please.

THE COURT: Just a minute.

I have gotten an affidavit called a supplemental affidavit of Mitchell Waife, and this is dated December 20, 1976, and it was submitted in the homes case, and I very much appreciate that. That is a fine affidavit.

MR. STERN: We received it this morning, your Honor.

THE COURT: Not knowing about the proposal of the 4 to 5 percent increase, naturally I haven't gone through to calculate the effect of that proposal on these homes, but I do note that there are a lot of the homes which appear to me to have pretty small reductions, so that I would think that the 4 to 5 percent would actually cover an awful lot of the cases of reduction.

MR. BRADLEY: Your Honor must also realize that the Health Department and the government recognize that a return to the '75 rates will have an adverse effect on many of the homes and it will also eliminate the trending factor that is being promulgated effective January 1st. So this is not just ignoring the problem by the state, your Honor. It is not simply legalistic.

MR. STERN: Your Honor, may Mr. Waife speak to that? He is here and he is the vice president of the association and the administrator of the Jewish Home and Hospital for the Aged.

THE COURT: Mr. Stern, when was the first time you heard about a proposal to increase rates 4 to 5 percent?

MR. STERN: Just now, your Honor.

THE COURT: I apologize, Mr. Mantzoros, for flying off. I think it is a response, but I really felt-- the reason I was anxious was that I didn't want to feel we were going back to square 1 because we had spent a lot of time on a very practical analysis of financial matters and I wanted to keep going in that line.

So I really take it that the -- although maybe nobody wants to admit this, I will consider the new proposal as a response to the problems that have been raised in court. If it would have been done anyway, that is wonderful, too, but I won't worry about that. From a practical standpoint it is a proposal which goes partway to doing something.

Now, I think that the problem we have got is that it has just been put forward. I wouldn't expect anybody to have had a chance to analyze the effect of it, but I certainly will hear anything you have to say, Mr. Waife.

MR. WAIFE: Your Honor, the fact that the trending factor is put in January 1st doesn't change the basic deficit picture simply that costs will increase as of January 1st uniformly throughout the state.

THE COURT: Let's take it a little slow. The most that I could do in this action, the very most, by way of preliminary injunction would be to order a return to the pre-November 1, 1976, rates. There may have been suggestions of even further relief. I don't think they could be very serious and I don't think I could even consider anything else. I can't get in the business of individually calculating rates and so forth. That is out of the question. You see my point?

MR. WAIFE: Yes.

THE COURT: So the area of controversy, so to speak, as far as my role in the preliminary injunction motion, you start with the pre-November 1st rates. The fact is that there were homes that were losing money before November 1st for reasons that are quite different from any -- let me start again.

There were lots of homes, as far as the information given to me, which were losing money before November 1, 1976, I have particularly in mind some of the profit homes which I have been looking at in the last little while. Those problems that accrued when those losses were occurring before November 1, 1976, that is nothing I can do anything about in a preliminary injunction.

You recognize that, right?

MR. WAIFE: Yes.

THE COURT: Okay. Now, I can't, for instance, require the state to pay actual costs. There are a lot of things that someone might want but I can't entertain that right now. So I am very interested in -- let me say this. If I ordered a return to the November 1st rates -- wait a minute. I will start still once again.

You talk about the fact of the trending factor. I don't know of any legal requirement aside from some requirement I would now impose that would compel the state to raise rates for tending factor or inflation or anything as of January 1st.

MR. BRADLEY: I think it is in the regulations, your Honor.

MR. BRENNER: One of the problems that we have in the facilities case is that--

THE COURT: Was anybody expecting an automatic increase as of January 1st?

MR. BRENNER: Yes, we were, for this reason, if I might explain, Judge: The regulation as opposed to the particular rates are due to expire on March 31st. It is an interim situation. Under this Part 88 --

THE COURT: What is your name?

MR. BRENNER: Richard Brenner for the Facilities. Mr. Lowell is not here today.

What we were supposed to do under the new part is to take costs two years ago and then trend them into 1976, 1975 and 1977 under the new Part 88 methodology.

Now, because costs have gone up between 1974 and 1975, it would be anticipated that when you took your 1975 costs and trended them into 1977, January 1st, you would have an increase. You would have had the increase under the old methodology and you would have an increase under the new methodology, in both cases. The problem that we have sort of focused in on, in the Facilities case at least, is they didn't do the proper job in fixing that trending factor. They didn't use, for example, intercounty labor union contracts, they picked and chose to result in a low trending factor. We think it should be a great deal more in that trending factor.

THE COURT: Is it true that regardless of whether there had been any injunction or not or regardless of whether there was this action there would have been new rates fixed January 1st?

MR. BRENNER: There has to be because as costs go up --

THE COURT: Is January 1st a magic date?

MR. BRENNER: Yes, because we work on an annual basis. So they take 1975 costs and trend for 1977.

THE COURT: I really missed this and I apologize to you, but I thought we had said this so many times and I wish somebody would have corrected me. I thought that these rates which were adjusted as of November 1st would stay in effect until March 31, 1977, and I can recall making statements to that effect and I didn't get corrected many, many times.

MR. BRENNER: I think there is a reason for not being corrected.

THE COURT: It would have helped me.

MR. BRENNER: Let me explain why. In 1976 we waited nine months for rates that were supposed to have been promulgated before 1976. So we had no way of knowing when we were here last week or ten days ago or two weeks ago that the state was in fact prepared to institute new rates January 1st. They were supposed to.

MR. STERN: Your Honor, may I say something? We were told at an earlier session by Mr. MacHarg that the state was in fact going to promulgate new rates April 1st to be announced February 1st. What is going to happen January 1st is not a new rate. It is simply a trending forward of an old rate.

THE COURT: I don't care what it is as long as it is a new amount of money.

MR. STERN: It had been done historically although nobody knew it was going to be done this year because the department has not told anyone. It has been done historically to reflect that on January 1st and each January 1st mandated labor costs, for instance, the labor costs go up four and a half percent, I am advised, under the union contract as of January 1st. In the past before the freeze, the industry came to expect the January 1st trending but this year we have gotten so many different concepts that nobody knew until now that they were in fact going to comply with the trending aspect.

THE COURT: I am not criticizing your statement, but what discourages me is that we go on one set of assumptions and I know for the last many hours before today we have -- at least I have gone, and I have not been corrected, on the assumption that unless some new development occurred the rates would stay the same through March 31st. Now Mr. Mantzoros gets up and says the rates will be increased as of January 1st and the plaintiffs' side of the table, at least Mr. Waife, apparently is trying to tell me, "Oh, that's nothing because that would have happened anyway."

MR. WAIFE: It is not a question it would have happened anyway. The difference is costs will go up January 1st. So the four and a half percent or five percent is absorbed in costs that were not in effect on November 1st.

THE COURT: You mean four and a half percent inflation in two months?

MR. WAIFE: January 1st because of labor charges.

THE COURT: You have a contractual ---

MR. WAIFE: The whole industry will be going up as of January 1st depending on dates of contracts and actual expiration dates.

THE COURT: Wait a minute. Are you telling me that labor contracts provided for increases of 4 percent or more as of January 1st?

MR. WAIFE: In the New York City area there is an arbitration ruling that calls for a wage package of four and a half percent as of January 1st. But that is not the only cost that goes up. Other costs will have gone up over and above costs in existence in November.

THE COURT: I can't follow you, Mr. Waife. You mix a whole lot of things up. Sure, we all know, I don't have to get told, that there are continual increases of some costs, but I am talking about things as of January 1st.

MR. WAIFE: If I could say one thing. The deficits that are reflected in our affidavits are not affected by this increase January 1st. That is my statement.

THE COURT: That is irrelevant to my problem.

MR. BRENNER: I have been advised by the state association people that in the metropolitan area at least there will be automatic increases effective January 1st in labor contracts.

THE COURT: Of what percentage?

MR. BENSON: There is a master labor contract that covers 90 proprietary homes in the New York City area that expired December 1st, 20 days ago. This is now in fact-finding. The contract that is patterned after the 1199 contract which went to binding arbitration in July --

THE COURT: What percentage increase?

MR. BENSON: 5 percent.

THE COURT: That is labor cost, but that is not a cost across the board, is it?

MR. BENSON: Labor is approximately 70 percent of our operating cost. There is also a minimal federal increas of 5 percent on January 1st.

THE COURT: Did your people ever give me the cost data I wanted?

MR. BRENNER: I think you have that in the affidavit sir.

THE COURT: When was the affidavit submitted?

MR. BRENNER: It was submitted this morning. We had a problem of communication with people in upstate New York.

THE COURT: I couldn't do anything for the profit homes on this kind of a record.

MR. BRENNER: We did have a problem that Friday night we went back to the office, we worked until around 9 o'clock, typed, and then we had to bring in people from upstate New York to sign the affidavit. It was hard to get the material together.

THE COURT: We have got to take this carefully and not mix a lot of things up.

I go back to the proposition let us suppose I granted a preliminary injunction. The most I could do would be to require a return to the November 1st rates. If I granted the preliminary injunction and if it were upheld on appeal or in some way became final, it would not include a requirement, obviously, that the state go farther than that and do any trending or make any increases on January 1st because of inflation or anything else in addition to simply the restoration of the November 1st rates. That is the ceiling on any relief I could give. I am convinced of this. Maybe I could be wrong but I think that is the absolute ceiling. I may not legally be able to go that far but at least that is the maximum I could even talk about.

Now, that's why in my view anything the state -- let's suppose, just so we can get something illustrated, that if I granted a preliminary injunction restoring the pre-November 1st rates, let us suppose that it would involve an across the board average increase from present rates or so-called new rates, let us suppose for illustration that it involved an increase of an average of 6 percent. I don't know whether the 6 percent is true or not, but I will just pick it for purposes of illustration.

Now, as far as I know, if that injunction became final and were approved and so forth, I don't know of any requirement that would make the state go above that for trending inflation or anything else. You gentlemen correct me if I am wrong but I don't know of any requirement.

MR. BRADLEY: Not only are you not wrong, you are absolutely correct, your Honor, but I also want to bring to your attention at this particular point the fact there will be new rates in effect March 1st of 1977. I'm sorry. April 1st.

THE COURT: It is very complicated and if I could take it one step at a time before everybody jumps up.

Now, let us suppose that the preliminary injunction was granted restoring pre-November 1st rates involving an average of 6 percent increase over new rates. Okay.

Now, let's put that aside just for purposes of comparison. When I say the maximum involved in my preliminary injunction, I am talking about going back as of

November 1st. Okay. I am putting that aside for comparison purposes.

Now, it seems to me that we ought to compare with that what the state plans to do, according to their representations today. They tell me that there has been submitted to the Budget Director a proposal to increase rates 4 to 5 percent beginning January 1st. Well, it seems to me of interest to everyone in this room, it is certainly of interest to me, to do some comparing. I am getting away from the legalistic problems and just comparing dollars and cents.

The 4 to 5 percent beginning January 1st is 1 to 2 percent less than my hypothetical 6 percent, but the state's proposal lacks a return to November 1st. But at least it is not simply a zero, it is a 4 to 5 percent proposal beginning January 1st, and one can hardly say that the state hasn't come forward with something.

This would be an increase for everyone, is that correct?

MR. BRADLEY: That's correct, your Honor.

THE COURT: That is another thing. Instead of returning to the November 1st rate, or pre-November 1st rates, which would involve a decrease for 70 or 80 or more homes--

MR. MANTZOROS: 130.

THE COURT: Whatever the number is. It would be an increase for everybody. This is not too easy to just cast aside and say "Oh, well."

MR. STERN: Your Honor, just following your thought and not making argument, this is applies starting January 1st and doesn't relate, I don't believe, to the November and December rates.

THE COURT: I just said that.

MR. STERN: Then there is nothing to compare. It is 6 percent as against nothing for November and December.

THE COURT: I know that. But the question is-- it goes without saying it doesn't take care of two months for the homes that have been reduced, but it narrows the area of controversy.

MR. STERN: Could we take a short recess so I could meet with my clients and have them better explain to me the impact of this.

THE COURT: I wonder this, Mr. Mantzoros. I looked down this list and I would venture to say that -- I am looking at the affidavit, Mr. Waife's affidavit.

MR. MANTZOROS: May I ask what page?

THE COURT: It is Exhibit 3. Let's take Niagara Falls Memorial Nursing Home. I am taking maybe an extreme case but it illustrates. Niagara Falls was reduced as of November 1st from $48.98 to $48.11 or a reduction of 87 cents.

Now I would assume an increase of either 4 or 5 percent would more than cover the 87 cents. I think that if you went through, there would be a great many of these homes where an increase of 4 to 5 percent would either cover the so-called differences or almost cover it or more than cover it.

However, there would be some like the Loretto Geriatric Center where the rate was reduced from $53 to $42.30 or a difference of $10.70. Mohawk Valley, a reduction from --

MR. MANTZOROS: Yes, your Honor, I see that.

THE COURT: I am trying to say this, that--

MR. MANTZOROS: Whatever it is, if your Honor please.

THE COURT: What it might be is this, that we might find out that the 4 to 5 percent increase took care of this difference in the vast majority of cases and perhaps in those cases we could set up a mechanism for individual treatment and examination of situations to see whether there are hardships requiring extraordinary relief. I believe it would wipe out the mass problem.

MR. MANTZOROS: During this recess we will call up long distance. I asked Mr. MacHarg to stand by for me so he could answer some of these questions during this recess while they are discussing it with their clients.

THE COURT: Here is the problem. Let us suppose that we have cases where a real need was demonstrated for special relief either because of the November-December situation -- let's suppose they might be able to demonstrate that there was a very severe problem created because of the sudden reduction November 1st and that your proposal for an increase January 1st wouldn't take care of them, obviously, for November and December. Let's suppose that they were able to demonstrate that that reduction for two months put them way behind to their suppliers or created some financial emergency.

Now, I would assume that the state would entertain an application for special relief, maybe some special payment, to take care of any particular problem growing out of November and December. Furthermore, I would assume that from a strictly prospective standpoint the state would accept applications for extraordinary relief because the 4 to 5 percent wouldn't be enough in their particular situation. Do you get my point?

MR. MANTZOROS: Yes. As a matter of fact--

THE COURT: We all know any proposal to raise rates as of January 1st doesn't in and of itself take care of any problems created in November and December and it could be there were some very severe problems created. If a home is already losing money, you know, two months, thousands of dollars not there, that could be very bad.

MR. MANTZOROS: I thought that this was inherent with our having to make the consent or my making a representation on that. I personally, and I am not testifying, that is my understanding of what Dr. Cicero said in those situations. I am walking on eggs as to what I am representing here. That is my understanding in general, that wherever within the department and within the regulations that they can take care of those things.

THE COURT: I think he did. We will recess briefly.

(Recess)

THE COURT: Let me just be clear, Mr. Mantzoros and Mr. Bradley. Is it correct that the Department of Health has submitted to the Director of the Budget or the Commissioner of Health --

MR. BRADLEY: This is a department project. They have submitted --

THE COURT: They have submitted to the Budget Director --

MR. BRADLEY: And he is required by law.

THE COURT: What have they submitted and when did they do it?

MR. BRADLEY: They submitted yesterday between 4 and 5 percent --

THE COURT: When you say between 4 and 5, it isn't in a formula that really is a percentage formula?

MR. BRADLEY: It is 4 percent, 4 plus. I don't have the exact figure.

MR. STERN: I think I heard someone say it was an average of 4 percent.

THE COURT: Was it done in writing? [illegible] Mr. Webb?

MR. WEBB: Yes.

THE COURT: Does anyone have the memorandum?

MR. WEBB: I don't have it with me.

THE COURT: Can it be produced?

MR. WEBB: Yes, we can get it to the Court.

THE COURT: What does it say?

MR. WEBB: The Commissioner of Health has submitted in accordance with the regulations that are in effect as this point in time as well as in compliance with the Chapter 76 of the laws of 1976, he has submitted rates to the Budget Director for the three-month period beginning January 1st expiring March 31, 1977. It will require the

Budget Director's approval.

THE COURT: What does it say about the new rates? I think as long as we are here I would like to be as specific as possible. What does it say? Does it say a blanket increase of 4 percent or 4.07 percent or some specific percent over the rate per patient day now in existence or how is it stated?

MR. WEBB: The normal certification letter that the Commissioner of Health submits to the Budget Director is a very general statement and a legal statement. In fact, there is submitted with it a cost--

THE COURT: I am talking about what was submitted by the Department of Health to the Budget Director.

MR. WEBB: That's correct.

THE COURT: What was it? What did it say?

MR. WEBB: If I may characterize it, your Honor, it is a certification letter to the Budget Director and in that certification letter it does not specifically state the exact percentage amount. That can be given to you, your Honor.

THE COURT: What does it state?

MR. WEBB: It states, I am paraphrasing, your Honor, but it says "I, the Commissioner of Health, am certifying to the Director of the Budget rates for the period beginning January 1st, ending March 31st, in accordance with I believe it is Part 86 of the Commissioner's Rules and Regulations.

THE COURT: Period?

MR. WEBB: I believe that is the paraphrase, your Honor, that's correct.

THE COURT: The Budget Director must know more than I do because it must mean something to him.

MR. WEBB: That's right. then, your Honor, that is the letter which the Budget Director signs for the formal legal certification. Accompanying that particular certification letter forthcoming from the department is a letter from the Commissioner to the Director of the Budget the impact of this certification. If that is forthcoming because it is because of these consultations we would have with the Health Department in accordance with what you asked us to do last Friday to facilitate us to be fully informed so we understand what is going on, we are expecting and in fact it has been basically agreed upon that the Budget Director's certification of these results will result in an across the board 4 percent plus rate increase.

THE COURT: Not that it makes a lot of difference at this point, but I am just curious. As of right now, the

Department of Health has sent something to Budget Director.

MR. WEBB: That's correct.

THE COURT: You talk about a thing that confuses me. You talk about it in terms of being a certification that the Budget Director will sign.

MR. WEBB: Correct.

THE COURT: Is this in the form, then, of a proposed certification for the Budget Director to sign?

MR. WEBB: Yes. It is a co-signed document.

THE COURT: The backup with the specifics still has to be --

MR. WEBB: It is forthcoming but we have fully consulted with the department in the last two weeks on it and we are expediting this because of the fact those rates do have to become effective January 1st.

THE COURT: When will we know what the plus is?

MR. WEBB: You want the exact amount which this will result in?

THE COURT: I want to know whatever it is. What we have been talking about, and I want to be clear on this, I understand from what you are saying, if there is any qualification of this I want to know so I understand what you are saying, that this will involve a uniform across the board increase from the present daily rate of a particular percentage, 4 percent or a little over 4 percent.

MR. WEBB: That's correct.

THE COURT: And not more than 5 percent I think is what you said.

MR. WEBB: Correct.

THE COURT: When is it that I could have the proposed certification letter plus the backup and I could also have an affidavit making it a matter of record as to what that precise percent would be? When could I have that?

MR. MANTZOROS: Excuse me for one second.

THE COURT: Surely.

(Pause)

MR. MANTZOROS: To expedite this, I was asking Mr. Webb a question. With the telex system that we have, we have some means of communication that could expedite it, they could put it on a telex, on regular paper, so it will be part of the regular record in this case. The certification plus the backup goes to the Budget Director, then his staff makes a recommendation to the Budget Director. He must make a decision on or before January 1st to approve this. We can get the backup by telex tomorrow.

THE COURT: I think what Mr. Webb and Mr. Mantzoros and Mr. Bradley are saying is that this isn't something that is just being submitted and it is up for grabs. You are telling me that this is very, very definite.

MR. MANTZOROS: With prior consultation.

MR. BRENNER: Your Honor, I am somewhat confused because it seems to deviate from the methodology. When you talk about a trending factor you don't talk about it applying to the final rate, only to a portion of that, the operating, and then they are different because o geographical areas are different. There will be more in one geographical area than in another and depending on size, too.

THE COURT: That is a fair question. You should know that. I was very explicit in what I asked you. I wasn't trying to put words in anybody's mouth. I was asking questions. I will ask it again. Will this involve a uniform across the board increase for all nursing homes of a flat percentage of the present daily rate?

MR. WEBB: That's correct, your Honor.

THE COURT: Do you understand my question?

MR. WEBB: Correct.

THE COURT: In other words, you take each home-- in other words, I could pick any home, profit or non-profit home, I could take their present daily raise that has been in effect since November 1st, and I can take 4.5 percent or whatever the percentage is that it ends up and I take that percent times the present daily rate and I get a dollar figure and I add that to the dollar figure and that would be their new daily rate as of January 1st.

MR. WEBB: That is generally correct. That is in essence what would happen.

THE COURT: Generally and in essence, what does that mean?

MR. WEBB: You take a rate that is in existence November 1st and you add on a trend factor which will approximately result in a 4 to 5 percent increase.

THE COURT: Wait a minute.

MR. WEBB: That is for each home.

THE COURT: What did you mean when you said generally and in essence? I asked a question whether there would be a flat, rigid, definite thing happen and you said yes.

MR. WEBB: Yes, that is exactly right.

THE COURT: Why did you say generally and in essence?

MR. WEBB: Because we have to go on an individual home basis. The exact dollar rate increase.

THE COURT: I am talking about percentages only the gentleman from the Facilities case, if you have further doubts, say so.

MR. BRENNER: This would be a complete departure from the methodology on the Part 88 because there you have to take geographical differentials, seize of facilities, a number of other factors that go into the trending factor per group.

THE COURT: In other words, you would say that if that old methodology was used there would be a different percentage increase.

MR. BRENNER: The percentage would vary even on the Part 88 or the told methodology. So this is something-- they usually apply to opening and not, for example, for real property. Real property goes into that final figure on the bottom where other costs go in and they normally would not apply the trending factor to the bottom line but only to a part of that rate. If it is the bottom, it means something different.

THE COURT: So we are not having any misunderstanding, Mr. Bradley, Mr. Mantzoros and Mr. Webb, you heard what the gentleman said.

MR. MANTZOROS: He is talking about the Facilities case.

MR. STERN: What Mr. Brenner is saying is that in trending factors historically what the state has done is taken out the capital costs or real estate costs which could result as high as $10 a day out of a $50 rate and apply the percentage to the remaining 40. They very usually do this with respect to different percentages across the state. As I understand what Mr. Webb has been saying thus far, there is going to be a uniform percentage applied to every home in the state and that is going to apply to their total rate.

MR. WEBB: That is not what I said.

THE COURT: That is what I asked you three or four times.

MR. WEBB: I'm sorry, your Honor. The gentleman is correct. The normal rate making system is does involve exactly what he said, breakingout certain kinds of costs. He is exactly right. We are required by law, state law, that is, Chapter 76, to in fact implement a 15-month rate period. The November 1st rats were for a 12-month rate period. The new rates that are going to come out will complete the 15-month rate period for three months. So it is generally correct. I don't know in individual cases, but in this case a percentage rate increase for trend will be applied to the part of those rates which in fact the trend factor would normally be applied to.

MR. BRENNER: There is also the question of a geographical differential and the size of the facilities.

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One may be impacted one way and another a different way depending upon its size and location.

MR. MANZOROS: That is the basic rate.

MR. BRENNER: We are talking in terms of any relief.

THE COURT: You gentlemen know I was reading figures. I haven't dealt in terms of parts of rates.

MR. MANZOROS: The trending factor is on top of whatever their basic rate is which includes the geographical factor. They are mixing it up.

THE COURT: Let's talk the same language. Let's go back to our old friend, St. Cabrini. The rate now is $50 per patient per day, isn't that right?

MR. STERN: Yes, your Honor.

When I talk about a rate I have been talking about that type of rate.

MR. WEBB: $55, your Honor.

THE COURT: We have repeatedly referred to those rates and those rates may have components but I am talking about the total rate.

Now, under the proposal what will St. Cabrini go up to and how will you figure it? You tell me.

MR. WEBB: Yes, sir. The 4 per cent will not be applied to the $55, your Honor.

THE COURT: I don't know what we have been spending our time on. I asked you before the recess. I took an example. This is such a colossal waste of time. What will it be applied to?

MR. WEBB: It will be applied to the basic rate.

THE COURT: What is that?

MR. WEBB: I don't know in this case. That $55 is an all-inclusive rate. In using that all-inclusive rate, it includes many allowable costs which in the regular rate making process are not trended. For instance, capital costs. When we are saying we are going to add on for three months --

THE COURT: Why didn't you tell me that before the recess?

MR. WEBB: Sorry, your Honor, I didn't know exactly what in fact you were asking. That is why I was using. That is why I used the words in essence and in general.

THE COURT: You didn't use those words until about the fifth question. You tell me how you figure this out and you give me an example so I will know what you are talking about.

MR. WEBB: Since we are talking about St. Cabrini Nursing Home, without knowing the exact amount which is the basic rate, say it is $55 which is the total, all-inclusive rate, there is a certain amount of that $55 which in fact will be the basis for which you apply a percentage factor to which will result in a new rate which will become January 1st and last through March 31st.

THE COURT: I don't know any more now than I did three hours ago. I am not interested in that. I am interested in dollars. You tell me. Aren't you prepared to come in here today and give me an idea of what this will mean in terms of dollars or overall percentages?

MR. WEBB: That is what it will translate into, your Honor. We got rates yesterday effective January 1st.

THE COURT: You prepared to give me in any way that I can understand an example of a rate and what it will mean in terms of dollars or percentages of the whole thing?

MR. WEBB: I am not prepared at this point in time to tell you the total cost impact of the effect of the new rates which will be effective January 1st.

THE COURT: Hasn't the Department of Health considered that?

MR. WEBB: Yes, your Honor. That is the backup.

THE COURT: Can't I hear from the Department of Health who knows about that?

MR. BRADLEY: No, your Honor, I don't believe so.

MR. WEBB: That is the backup I was referring to which is forthcoming.

THE COURT: How soon can such a person get down here?

MR. WEBB: We will now--

THE COURT: How soon could such a person get down here?I will come back this evening. I want somebody this evening. To me this is absolutely inexcusable to make a representation to me, and I could go through the record of what has happened here this afternoon and I have had these representations about 4 percent increases and I asked specifically and I really thought, and I don't think my questions were really too unclear, and I thought I was being told that there were 4 percent increases in the rates and it was only when this attorney for the Facilities began to probe that that I found it wasn't. Now you are not even able to tell me what it will amount to either in dollars or percentages or in a specific example, you don't have anybody from the Department of Health who knows the figures they have been considering. So what did gather here this afternoon? So I am going to say to you, you bring that fellow down from Albany or wherever he is and you bring him down here tonight and you give me a time and I will be back. You can get him in a car and get him down here or get him in a plane.

MR. BRENNER: Your Honor, referring to this matter and by way of illustration, we had Mr. Benson testify last session and I think the Department of Health mentioned we can collect some $152,000 in a matter of a week or two weeks. He was just told it would take two months.

THE COURT: Mr. Benson's testimony was so misleading. I don't want to go back to Mr. Benson.

MR. BRENNER: My point is if they are talking today about giving immediate relief, hardship relief and here is a situation where they have admitted that they owe $150,000 and they are going to do it for a few months--

THE COURT: When can you have the person from the Department of Health down?

MR. BRADLEY: Your Honor, I have no idea.

THE COURT: You get on the phone. We will adjourn and you get on the phone. I want somebody down here tonight. I don't care where you get him. This is a gross imposition to have come here today and not have that information and to sit here since 3:30 and make the representations you have made and it all blows right up. I just can't spend time like that. You get on the phone and you must know some home phones and you get somebody down here and I will come back in time tonight that you have him here and we will finish this.

THE CLERK: Court will take a short recess.

(Recess)

(Discussion off the record in robing room.)

THE COURT: Let me put a direction on the record. We have had an extensive discussion in chambers and as a result of this I am informed by Mr. Webb of the Budget Director's office that the new rates are now listed. The exact dollar rates, the total rates -- that's what I am talking about -- per patient perdday which are intended to go into effect January 1st as now proposed.

That list is in Albany. I am directing pursuant to information I have obtained, which is to the effect that people are standing by in Albany ready to assist the court, I am directing that those rates either be telexed to New York tonight or driven down or flown down tonight, that they be made available tonight at the earliest possible moment to plaintiffs' attorneys and plaintiffs' attorneys can arrange the mechanics. But the state officials are to extend the maximum cooperation so that the rates can be made available and studied overnight.

Now, the importance of this is that we are going to resume at 10 o'clock tomorrow and by that time I expect counsel to have studied these new rates, compared them with the present rates and done the obvious analysis.

I am also expecting that at 10 o'clock tomorrow responsible -- one or more responsible officials of the Department of Health will be here. What I expressed to the lawyers in chambers, and I will express on the record, is this, that I am very emphatically in favor of having anything which is done be done in accordance with regulate state procedures and so that this proposal to increase rates by trending is, in my view, a very constructive step.

However, I also expect the state to have some reasonableness and some flexibility as to exact percentages and dollar amounts, and I don't expect that just because some particular parcentage like 4.0732 has been arrived at that it is going to be regarded as frozen in dry ice or whatever the proper expression would be. I don't expect that. I think we have to look at the realities of this litigation. I will expect a reasonable spirit of compromise to prevail so that if some adjournment can achieve a narrowing of the issues substantially, then that will be considered.

So that's why an official from the Department of Health along with Mr. Webb from the Budget Director's office is required to b here at 10 o'clock tomorrow.

Assuming -- well, whatever the state is willing to do ultimately as far as the rates beginning January 1st on a general basis, we come back to the situation of individual hardship cases that are not taken care of by those rates. Now, I think it is human nature that everybody will want more money than they get, and the desire for maximum money has been amply demonstrated in this lawsuit. But a mere desire for money does not mean a need for money, and so what we have to do is to have a mechanics where genuine cases of hardship created by this rate situation beginning November 1st, genuine cases are considered, considered immediately and acted on. And as I stated off the record, this I think is necessary in view of the fact that the state acted precipitately on Novemberlst, and I think there have to be some compensations for that.

So the state -- I am asking Mr. Mantzoros, Mr. Bradley and the other state officials to consider exactly how hardship cases which are not handled by the new rates are taken care of, ruled on quickly and as simply as possible and as objectively as possible, and I am thinking, as I have said, that it may be necessary to appoint one or more special masters to make recommendations to either the court or to the state officials, but it may be that we need to have an emergency setup like that, and it may be that the facts that are gathered in those proceedings could be ultimately valuable in illuminating the overall rate procedure. So all this is to the good. But, in any event, I want you to consider that, Mr. Mantzoros and Mr. Bradley, because that is going to be a very important part of the picture.

And again, that isn't really departing from normal state rubric. State rubric provides for appeals in special cases. So it is not much of a departure.

Okay. We will see you at 10 o'clock.

(Adjourned to 10 A.M., December 22, 1976.)

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NEW YORK ASSOCIATION OF HOMES
FOR AGING, INC., et al.

76 Civ. 5113
vs.
76 Civ. 5233
76 Civ. 5320

PHILIP TOIA, et al.

(And two other cases)

December 22, 1976
11:00 a.m.

Trial resumed.

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(In the robing room)

THE COURT: This portion of the transcript relates solely to the action entitled New York State Health Facilities Association, Inc., et al. against Toia, et al, 76 Civil 5320, and I have before me at this conference the attorneys for plaintiffs and the attorneys for defendants in that action.

Mr. Brenner on behalf of the plaintiffs, I believe, wishes to put something on the record.

MR. BRENNER: Yes.

At this time, your Honor, we do plan to file the appropriate paper immediately afterwards as soon as possible, we would like to withdraw this action voluntarily and without prejudice to any other further proceedings in the forum.

I hope that the record will indicate that the withdrawal should not be -- should not produce any adverse inference against the plaintiff and with respect to the substance of the case and with respect to any applications that might be pending for prelininary injunctive relief inasmuch as the plaintiff has not had an opportunity to present its case for such preliminary injunctive relief.

No answer as yet has been filed in the action. The matter has been discussed with the facilities, the leading plaintiff in the lawsuit, and it has their concurrence and we will be advising all the members of the association in such form as your Honor indicates as well as any other facilities immediately or as soon as possible after this action today.

We intend to institute a proceeding in state court on behalf of the class where we believe that the state court can give the full relief to the class that we are seeking here since in state court there are no impediments of the 11th Amendment that might work to bar any retroactive application of a judgment so that we do not believe it is to the prejudice of the class and, in fact, it is in furtherance of their interests that this proceeding proceed in the state forum and in an expeditious fashion and we hope to file by next week. We don't believe it is any prejudice and it should further the interest of the class.

THE COURT: Mr. Bradley, do you have any objection on behalf of the state defendants?

MR. BRADLEY: May I see the rule for just a minute?

(Pause)

THE COURT: I will discuss with you the rule 23 provisions, but aside from that, do the defendants have any objection?

MR. BRADLEY: No, your Honor, we do not.

THE COURT: This would be technically speaking, a voluntary dismissal under rule 41(a)(1)(i), which provides for the filing of a notice of dismissal at any time before service by the adverse party of an answer or a motion for summary judgment.

Has the state filed -- have you filed a motion?

MR. BRADLEY: No, your Honor, I think we have just filed some answering affidavits.

THE COURT: So there is no motion filed yet?

MR. BRENNER: No.

THE COURT: In any event, the state consents to this procedure.

MR. BRADLEY: We have not answered either.

THE COURT: Rule 23(e) provides that a class action shall not be dismissed or compromised without the approval of the Court and notice of the proposed dismissal or compromise shall be given to all members of the class in such manner as the Court directs.

Therefore, I think two things have to be done to effectuate this. There has to be approval of the Court, and I think you have to send notice of the dismissal to the members of the class.

I do approve the dismissal and I wish to state the following: There has been filed a motion for preliminary injunction in this case which has proceeded along with the motion for preliminary injunction in the companion case, 76 Civ. 5113.

Now, certain affidavits, briefs and testimony have been presented in this Health Facilities case which is being dismissed, that is, 76 Civil 5320. Moreover, there has been very extensive argument and discussion in the two companion cases and a number of hearings.

However, I wish to make it absolutely clear that there has been no adjudication whatever of any phase of the Health Facilities case, 76 Civil 5320; there have been no findings made by me in respect to this case.

I approve the dismissal of this case under rule 23(e) because it has been represented to me that there may be an 11th Amendment problem which might prevent the granting of any money judgment against the defendants. I am not finding one way or the other on that question of law, nor have the plaintiffs made any concession that they would be unable to obtain such a judgment, but it is a bona fide problem, it raises bona fide questions which, indeed, make it advisable for this action to proceed in the state court for that problem would not be presented.

Therefore, it seems to me very much in the interests of the class as well as in the interests of the defendants to have the litigation proceed in the state court, and I approve the dismissal of this action.

I would like to direct, however, that written notice, a very simple form of written notice, be given immediately by mail to the members of the class under rule 23(e) and I will direct that following the giving of such notice an affidavit be filed in this action, including a copy of the notice and describing to whom it has been sent.

MR. BRENNER: Your Honor, off the record.

(Discussion off the record)

THE COURT: Let the record show I am signing the approval of the dismissal of the case. Actually this hasn't been signed by the plaintiff's lawyers, but I will hand it to them for signature right now.

Please sign this, Mr. Brenner.

(Document signed)

(In open court)

THE COURT: We have had a long discussion off the record and I want to get back on the record now.

I think the first order of business is to have some kind of report about the information obtained last night regarding the changes of rates proposed beginning January 1, 1977.

Can somebody summarize that? I think that ought to be in the record.

MR. MANTZOROS: Mr. Webb and Mr. Bradley worked until 5 o'clock this morning. Dr. Cicero did come down to aasist, and he may have some points he wants to have further refinement on the January 1 situation.

THE COURT: Just so the record shows, did the defendants receive information and schedules showing new rates?

MR. STERN: We sat together with defendants' counsel on the telephone and wrote down the new rates as they were read to us and we have the same information, your Honor.

THE COURT: Is that in some schedule that could be made an exhibit for the Court?

MR. STERN: Your Honor, we have it two ways. One, with respect to the new rates that had been implemented on November 1, 1976, we had written next to each rate what the January 1, 1977 rate was.

THE COURT: Are you referring to the document that is Exhibit 3 to Mr. Waife's supplemental affidavit?

MR. STERN: We have that as well with

another column over here, a fourth column, listing the January 1, 1977 rate.

The only problem from your Honor's point of view with this is we only listed on here the homes that received decreases. We have that information for each of those homes.

THE COURT: Let me see what you have.

(Handed to the Court)

THE COURT: Let's mark this document for identification.

(Plaintiffs' Exhibit 15 was marked for identification)

xx

THE COURT: Mark this 16.

(Plaintiffs' Exhibit 16 was marked for identification)

THE COURT: Tell me, Mr. Stern, what is 15 for identification?

MR. STERN: 15 for identification is a hospital memorandum which listed the rates, the new revised rates, as of November 1, 1976, retroactive to January 1, 1976. That is the typewritten portion in the column marked daily rate.

Pencilled in or written in next to each daily rate is the January 1, 1977 rate that we learned about last night.

THE COURT: Then 16 for identification is this sheet that was Exhibit 3 to the Waife supplemental affidavit.

MR. STERN: Correct.

THE COURT: Showing homes that had been reduced as of November 1, and you have added a column showing the proposed new rate as of January 1, 1977.

MR. STERN: Correct.

THE COURT: That is excellent.

MR. MANTZOROS: That we need an extra copy of.

THE COURT: I am sure he will give that to you.

Have you arrived at any position, Mr. Stern, as to how you view the situation as far as beginning January 1, 1977, whether you need to study it and analyze it or what?

MR. STERN: It radically affects my clients insofar as my prior request for preliminary injunctive relief relating to the month of January, your Honor, and it needs great study by me to see what the effect is in particular cases. We continue the entire methodology reflected by it on which it is based, but as a matter of dollars it deals with my clients in a variety of ways, the impact of which I have not fully digested.

THE COURT: I take it, then, that for the time being any request for preliminary injunctive relief as far as rates to be paid beginning January 1, 1977, I will hold that in abeyance until I hear from you further.

MR. STERN: That is correct, your Honor.

THE COURT: I think you said in the robing room when we were talking off the record that you still wish to focus hard on the problem involving November and December, 1976.

MR. STERN: For purposes of this application, that is what remains, your Honor.

THE COURT: We were discussing off the record in the robing room the question of whether there would not be an 11th Amendment bar to this court now or tomorrow or something like that directing the state to make some payments -- let me start again.

We discussed whether there would be an 11th Amendment bar to granting a preliminary injunction affecting rates for November and December, 1976; and we analyzed the request for preliminary relief contained in the plaintiffs' original motion papers and that led me to ask a question of Mr. Mantzoros as follows:

Was there anything which caused the so-called old rates to expire October 31, 1976, or, to put it more precisely, if the Department of Health or the Commissioner of Health had not promulgated new rates effective November 1, 1976, would the old rates have gone on or would they have expired?

Mr. Mantzoros said he wanted to consult with Dr. Cicero and he wanted to come back with an answer to that question.

Are you prepared to answer that question?

MR. MANTZOROS: Although I have not consulted Dr. Cicero, he may be prepared to give you the answer now.

THE COURT: All right.

MR. CICERO: Your Honor, the rates would not have expired as such on October 31st if the commissioner had not come out with new rates on November 1st.

THE COURT: That is the answer to my question.

MR. CICERO: However, the Court should know that the Commissioner of Health was obligated by law in any event to come out with a rate from January 1, '76, on. He had to do that. The fact that it was November 1st was merely a matter of timing, if you will. The law went into effect on -- it was signed by the governor on March 31st. We had to get the rate system into effect to use it as the law directed. So it was all a matter of timing but he had to come out with rates during 1976. There is no question about that.

THE COURT: All right. And he had to come out with rates that would be effective retroactively to January 1, 1976?

MR. CICERO: Absolutely, your Honor.

THE COURT: Did the statute say when he had to come out with those rates? Did it say he had to come out with them within X months?

MR. CICERO: No, your Honor, there was nothing like that.

THE COURT: The rates that were in effect up to November 1 were pursuant to what instrument?

MR. CICERO: They were the 1975 rates that were carried through and they became interim 1976 rates, your Honor.

THE COURT: And that was according to the hospital memo that was issued back in late 1975, right?

MR. CICERO: Yes, your Honor.

THE COURT: Now, Mr. Mantzoros, let's take this very slowly. I think it is clear from what has been stated that there was an instrument, namely, the hospital memo of January 9, 1976, which had the effect of providing for particular rates that were in fact paid beginning January, 1976, and would have continued until changed.

It is further clear that the change came about exactly as Dr. Cicero has mentioned.

Now, for the sake of our preliminary injunction problem, figuring out whether we are dealing with a mandatory injunction -- what is the other kind of injunction?

MR. MANTZOROS: Prohibitory. You used the word inside. A restraining side. For affirmative relief.

THE COURT: And whether we have got an 11th Amendment problem.

MR. MANTZOROS: They never challenged the --

THE COURT: Wait a minute. Please. We looked in the robing room at the terms of the original application which was filed by the plaintiffs on November

19th.

As we saw, the plaintiffs asked for a temporary restraining order which you opposed and which I denied. But they asked on November 19 for a temporary restraining order enjoining and restraining the defendants from applying part 88 or part 86-2 or applying the Medicaid reimbursements rates thereunder to any non-profit nursing home to the extent that their rates were reduced, and it also sought to prevent them from collecting retroactively under the new rates. They also noticed for hearing a preliminary injunction requesting the same relief.

We can engage in arguments about the interpretation of those requests and how those requests fitted into the category of preliminary injunction and how those categories related to the 11th Amendment and other problems, but at least as of November 19 they were asking for that which I have read, and a Court, it seems to me, might well have considered that this was in the nature of a request for a prohibition. The request was to put aside the new rate and leave in effect the old.

Now, the thing that bothers me is this: That whatever legal rights the different sides would have had as of November 19th at the time of those requests, whatever they were they were as of that date. Now we are at December 22 and I am concerned if I am going to be faced with any argument that the fact of the relief is deemed to have changed because of the period of deliberation and hearings and so forth.

Let us suppose just hypothetically that there was no 11th Amendment problem if the relief had been granted on November 19th. I am not saying there wouldn't have been, but I want to suppose hypothetically there would have been no 11th Amendment problem.

Now, do we suddenly have an 11th Amendment problem on December 22 or December 25 or December 29 because the Court and the parties have taken time to deliberate?

MR. MANTZOROS: I understand, your Honor. May I say this: Let's use what would have happened as of November 19 and then what the arguments would be in the Second Circuit.

THE COURT: I have got a more simple question. Do you contend -- do the defendants contend that there is now an 11th Amendment problem of a different kind than existed on November 19?

MR. MANTZOROS: No. There are other arguments. This argument was brought up and I would like to argue it.

THE COURT: Can't you just let me finish?

So you don't content that the passage of time has created any new defense?

MR. MANTZOROS: And the Court had no part in that at all because of its deliberations.

THE COURT: Please answer my question. Do you or do you not content there is any new defense created by the passage of time?

MR. MANTZOROS: No.

THE COURT: You don't contend?

MR. MANTZOROS: No, sir.

THE COURT: So you are relying on the same defenses you would have had on November 19?

MR. MANTZOROS: And in addition the other ones which we never argued.

THE COURT: You just run on so fast I can't follow you.

So you are relying on whatever defenses you would have had as of November 19th, those only, right?

MR. MANTZOROS: Right.

THE COURT: What are they?

MR. MANTZOROS: Apart from those which we have nothing to do with this Court's deliberations, had no effect with this relief, let's go back to November 19th, thatwould be the situation. I have it in the briefs. Counsel have a job to do and I appreciate it. We never did get into oral argument. This is the first time we have had some chance to talk about some law.

My argument is this, as I can piece it together. The challenge here was not to the basic statute. Your Honor asked the question perfectly and absolutely correctly: Is there an expiration as such or, in quotes, for October 31st? What happened. Were they entitled to 60 days? They were not. That was specifically taken out.

THE COURT: You throw so many things in I simply cannot follow you. Do you want me to follow you?

MR. MANTZOROS: I will go back. There was no specific challenge to the underlying statute effec tive April 1, 1976, mandating the new method of the prudent buyer methodology of computing rates which everyone knew. That was never --

THE COURT: We know what was challenged. He has it spelled out in his application.

MR. MANTZOROS: Now has the complaint in any way challenged the reasonableness, the inaccuracy of its execution, the inaccuracy or incorrectness of its implementation under the new prudent body? They say nothing.

THE COURT: What do you mean by "it"?

MR. MANTZOROS: Plaintiffs' complaint says absolutely nothing.

THE COURT: But what?

MANTZOROS: Any challenge to the statute or any challenge to the implementation or the inaccuracy or accuracy of the new regulations.

THE COURT: I don't know what accuracy of regulations means.

MR. MANTZOROS: Like Article 78. You would say you didn't do this, didn't do this, you didn't follow state law in promulgating these new rates, therefore they are not in effect. There is absolutely nothing in the complaint at all. It is a sham complaint, completely hollow, if I may use that expression.

Therefore, when they come in and say

"Stop it," there is nothing to be stopped because the statute is still there. If they had challenged the statute, Chapter 76, in time or even afterwards and said this statute is unconstitutional and reached the constitutional level that the Supreme Court requires for 1983 --

THE COURT: You are losing me. There is no use even talking if you rattle on at such a rate and bring in so many things that I can't follow you. I just cannot have this.

MR. MANTZOROS: It's in the brief. They haven't answered. What I am saying again is if they had challenged the basic statute then we would have had what your Honor would have said, some basis for this Court as to what should be done.

THE COURT: Let me interrupt you. You do not have to continue to repeat that they don't challenge the statute.

MR. MANTZOROS: What do we have then?

THE COURT: I would assume that they don't. I don't have to be told that 15 times in 15 different ways. That we do not have to mention further today or ever.

But they are challenging and they are

asking for --

MR.MANTZOROS: They haven't challenged a thing.

THE COURT: Would you let me finish?

MR. MANTZOROS: All right.

THE COURT: To say they don't challenge anything is absurd.

MR. NANTZOROS: It is a sham complaint.

THE COURT: They ask for an injunction against the application of these regulations and the specific rates promulgated thereunder. So I know and you know and everybody in this room knows what they are challenging.

MR. MANTZOROS: For what reason?

THE COURT: And they are challenging them for a number of reasons, all of which I don't fully understand but I think I can recite, and I don't regard it as a sham. They are challenging -- what they are actually challenging obviously are the new rates, the dollars and cents new rates.

I will ask you to sort of wait until I have finished. Do you mind?

MR.MANTZOROS: I would be happy to.

THE COURT: Since you seem to be in a mystery about what they are challenging I think we ought to have that clear. They are challenging the new rates. They say that the new rates were not calculated in a valid manner, they say that there was no procedural due process in announcing them and in putting them into effect.

Now, they may be right, they may be wrong, but I haven't been shown any reason why I grant summary judgment throwing out this action as a sham, and, indeed, it seems to me that there is, to say the least, a serious question, and I have said this to you many times and you have certainly acquiesced in my statement that there is a serious question about whether at least the proper procedures were used in putting these rates forthwith, at the most, one day's notice of what they were.

MR. MANTZOROS: I never acquiesced in that, ifyour Honor please. It is in the statute and I couldn't acquiesce because it is in the statute.

THE COURT: I am saying to you that there is a problem about the new rates which has kept this litigation puttering along for some month.

MR. MANTZOROS: Let's assume, if your Honor please, that your analysis -- and we will follow through assuming it is correct, that they have made some allegation as tothe procedure. Then what happens? The rates go out but the statute is still there. When you asked about the expiration, there is no underlying authority tied in with the proposition, section 41 of the State Financial Law, that they can be authorized to reenact. You can't reenact a reappealed debt statute.

THE COURT: If there has been a violation of due process the federal district court, it seems to me, can order whatever rates or whatever salary payments or whatever was going on continued. It is so obvious to me that --

MR. MANTZOROS: That is going to be the issue in the Second Circuit.

THE COURT: I am in the district court right now.

MR. MANTZOROS: That is the gut issue. Judicial legislation may be what they are asking for. Now we are getting down to the refinement. That is the bottom line.

THE COURT: I ask you, Mr. Mantzoros, this: The reason we have had all these many hearings is it seemed to me there was a realistic recognition that there are points on both sides as far as the legal merits of the case. You might be right, you might be wrong. The plaintiffs might be right ot they might be wrong, but there was a horse race here. It seems to me you would have had no reason to even continue to discuss if there hadn't been something to talk about here.

So, it seems to me there was a recognition that there were legal arguments pro and con for each side, and therefore we got down to dollars and practicalities. That's why we had all these statistics and financial information and so forth.

I would like to return to that for a moment and I would like to ask you this: Let us suppose that one or ten or fifty or a hundred homes is really badly disadvantages, a bona fide valid case of severe financial hardship created by the sudden imposition on November 1 of the new rates with no opportunity, no notice that they were going to have to fire staff, nobyd coming around and saying "If you have to fire staff, we'll give you phase-out assistance" and so forth. Just slap bang new rates.

Now, let us suppose that some home could come in and say "That really hurt me. I couldn't turn around that fast. I haven't paid for the milk. I may be threatened with violation of federal and state regulations, I may be threatened with tort actions or lawsuits. So I have bad financial hardship. It is fine you are goingto raise these rates as of January 1, but November and December, this is a sixth of the year and I can't sneeze at November and December. November and December alone present me with some problems because the milk seller hasn't forgiven me for November and December, he sold me milk and he happens to want to collect, and a few other things."

Now, I envision that there are such problems, and you can talk all you want about your legal defenses but there are some legal offenses, too, on the other side.

So I ask you in the spirit of what we have been talking about in all these hearings and in the spirit of what I think the state has come up with as of January 1, which nobody ever heard about until we had a lot of hearings in this litigation, and I ask what the state is prepared to think about as far as November and December.

MR. MANTZOROS: Dr. Cicero is here, my expert witness.

MR. CICERO: I think, your Honor, if we

were at November 1st today and if some home came to the State of New York, the State Health Department, and said, "I accept these rates. Can I sit down with you and review the budget" and if it is a good rate and if they agreed to accept what we said would still keep them at a good state level, given that set of circumstances, uncontested, the state says "Here are the codes and the rules. I, you do X, Y and Z, you meet the state standards."

Under those circumstances the state was prepared -- the health department was prepared to enter into a phase-out arrangement as long as it was not a situation where they would say "But we need this, we need that."

If the state had the opportunity to say here is, for instance, in one home $16 worth of cost savings."

THE COURT: What if the state is wrong? What if your recommendations are ill founded? What if the fellow who has been going around and examining is wrong? What about that situation where it would be wrong in principle to accept the state's recommendation?

MR. CICERO: I guess that is what the

Court is about.

THE COURT: You want me to handle it?

MR. CICERO: Some Court would have to handle it.

MR. MANTZOROS: It is not a constitutional issue. They can go to the State Court.

THE COURT: You have mentioned an appeal process and I guess what you have told me is that a home which feels aggrieved by the new rates had the right to appeal, right?

MR. CICERO: We put it in the regulations, your Honor.

THE COURT: So any of these homes which are now suing would have had the right to appeal the November 1 rate, is that right?

MR. CICERO: Yes, your Honor.

THE COURT: What would they have done to carry out that appeal?

MR. CICERO: They would have come forth with information that they felt would have justified their case as far as their request for an appeal. It would depend on where the ceiling was applied that hit them in particular. It would be an individual by individual basis.

THE COURT: Just tell me what they would do to appeal. What would they do, write a letter?

MR. CICERO: Yes.

THE COURT: Who would they write the letter to?

MR. CICERO: They would write a letter to, say, Mr. McCann, who was present inthis court and request the opportunity to appeal.

THE COURT: Who is Mr. McCann?

MR. CICERO: Assistant Commissioner for Health Economics. I thought he was here before.

MR. MANTZOROS: He was.

THE COURT: So they would write a letter and then what would happen?

MR. CICERO: They would present us with their story. They would say "We have out of our 200-bed home 150 people who are bedridden, require X number of hours of bedside care, require therapeutic diets greater than the average in the state as a whole or the region."

It is this sort of thing. It is a very detailed and complex matter. It is not a simple thing. I didn't mean it in a pejorative sense.

THE COURT: Who would they present this to?

MR. CICERO: The State Health Department.

THE COURT: Are you saying that the State Health Department would have the power and the discretion to review that matter and to raise their rates if it felt --

MR. CICERO: Absolutely.

THE COURT: I take it those rates could have been raised to any level that the State Health Department felt necessary.

MR. CICERO: Absolutely, your Honor. Subject to the director of budget.

THE COURT: You are looking at it as to what was necessary?

MR. CICERO: Absolutely, your Honor.

THE COURT: And that could have been up to the pre-November 1 rates or above, whatever you felt was necessary?

MR. CICERO: Wherever it landed, your Honor.

THE COURT: Did anybody file an appeal?

MR. CICERO: Yes, we have had appeals filed.

THE COURT: When were those filed and by whom?

MR. CICERO: I can't.

THE COURT: Subsequent to NOvember 1.

MS. WALL: Margaret Peitz filed one.

THE COURT: Margaret Peitz filed an appeal November 17. What happened on that appeal?

MR. STERN: We have the representative of Margaret Peitz who attended the meeting with the state representative here who could tell you, your Honor.

THE COURT: We will get the facts. As long as Mrs. Wall is talking, what happened on the Margaret Peitz appeal? Who was it presented to?

MS. WALL: It was presented to our office, Ma. McCann's office.

THE COURT: Who handled it?

MS. WALL: Our staff.

THE COURT: And what happened to it?

MS. WALL: We reviewed it specifically item by item. It was basically an appeal to the ceilings and to several different items.

MR. CICERO: In fact, the rates were raised four dollars.

THE COURT: When was that raise?

MS. WALL: It is not official.

THE COURT: Was there some decision or memorandum or something that constituted a ruling?

MS. WALL: In this particular case we combined it with our study for the Court.

THE COURT: You hadn't ruled on that before the Court told you to?

MS. WALL: That is right.

THE COURT: When did you get busy on that Margaret Peitz appeal?

MS. WALL: Right after we were directed to by the Court last week, I believe.

THE COURT: Which raises a question in my mind, obviously, as to whether anybody would have gotten very far with appeals ifthere hadn't been this lawsuit.

MS. WALL: It is a matter of priorities.

MR. CICERO: Your Honor, we made a firm agreement to look at the ones hit the hardest and we looked at those on all appealable matters.

THE COURT: I am not trying to be snide with you in any degree, but I have a practical problem and that is this, that I am uncertain at the present moment about -- I say uncertain. - I am not trying to prejudge this. I say this with the utmost respect. I am uncertain at the present moment as to both the speed and efficacy of the appeal process and I want to go into this to the extent I need to but right now I don't know whether there really was or was not what I would consider a reasonable remedy in the formal appeal process for those homes who had been -- who felt disadvantaged by the November 1 rate order.

I think there is something in the record, a home, I think it was a proprietary home, that wrote to the department and said they were closing and nothing was done and it closed.

MR. CICERO: I don't know about that. It may have happened but we have been threatened many times with closures and some have closed but there are other circumstances, your Honor.

THE COURT: I have got a note about Coronet.

Were there other appeals besides the Margaret Peitz?

MS. WALL: We received many.

THE COURT: You received many appeals. How fast are they processed?

MS. WALL: The full processing?

MR. STERN: Yes.

MS. WALL: I would say a month at least.

THE COURT: And that is processing through the department?

MS. WALL: Yes.

MR. CICERO: Estelle, a lot of that depends on how complete the information was the first time.

MS. WALL: There is a whole procedure has to take place in which we have toconsult with the people in the program area of the Health Department to verify the appeal. So, therefore, we cannot handle it just as paperwork in our office. It has to be verified through them. It takes time.

THE COURT: And then suppose they lose out in the department, they can go under Article 78 to the State Court?

MR. CICERO: YEs.

MR. MANTZOROS: You had an example where you get this information to them by Wednesday so they filed an appeal and you found they hadn't sent the information in. Then your Honor said for this survey we did with five when and how soon can you get it to Mrs. Wall and when can you receive it?

Mrs. Wall said two days, Wednesday, we would be glad to hear it. But they hadn't submitted anything to us.

THE COURT: Let me ask you this, Mr. Mantzoros, Dr. Cicero or Mrs. Wall: Somehow there is a point I have tried to make that I don't think comes across, and that is this, that the appeal process sounds perfectly reasonable in a normal situation. Let's suppose we were back at January 1, 1976, and if the state had come through then with an increase that corresponded to some price index or something that was of the kind that had been going on in the past, if the trends and procedures are more or less followed, and if nothing terribly unexpected happens and if things are going along, and let's say there was a 5 per cent or 6 per cent or whatever increase as of January 1, 1976, and this is the kind of thing that had been going on and people pretty much expected, if an individual home is in a very bad way and feels that that isn't enough and wants to appeal, then you can't quarrel too much with that process, that's to be expected and the time it takes, if it takes two weeks, a month, it has to go through different procedures, well, okay, that strikes me as a reasonable procedure.

What really bothers me here, and I wish I could get this across -- I may have, but you don't want to make concessions-- but what bothers me here is that something different happened as of November 1.

Now, I am sure that the homes had warnings that there were problems here. One warning was the fact that the rates didn't go up as of January 1. That would lead a reasonable man to have some warning that something is afoot. The fact there was new legislation in March, that would be some warning in a general way that things are not proceeding just in the old pattern. But I think the record indicates that nobody really knew the exact impact of that until the rates were promulgated and that was done, there were scads of productions, the great majority of homes were reduced and it was done without notice. There was no notice.

Mr. Mantzoros,just focus on this.

MR. MANTZOROS: I do. I share it with you.

THE COURT: That is a different kind of situation than the thing I postulated earlier. Whenever in an inflationary period you have reductions, that is a problem. Whenever you have reductions without real notice of the exact amount of the reductions, that magnifies the problem. When you have reductions that might make it necessary to reduce staff, how fast is a person supposed to turn around?

So all this adds up in my mind to a very severe procedural problem.

The plaintiffs are really requesting that there be an across the board directive to eliminate all reductions. That is their request by their terms.

I think there is a lot to say for ordering such across the board relief. Can I assume that that would cost the state more -- we were using a figure of $5 million before which took into account both situations where there were increases -- both situations where there were increases and situations of decrease. I am not saying that right.

The $5 million for November and December would be involved with a complete return to the November 1 rates for all the homes, both proprietary and non-profit and it would mean decreases for some and increases for most.

Has anybody got the figure which would be involved if all the non-profit homes who were reduced were restored? How much would it cost the state for November and December?

MR. MANTZOROS: I am checking with the budget director.

Maybe less.

THE COURT: Maybe less than what?

MR. MANTZOROS: The five million.

THE COURT: I think you had better get that. That is how the state would be disadvantaged if this relief were granted in this case. You had better be able to tell me what the cost to the state would be. What is the horseback figure? You don't know.

Anyway, Mr. Mantzoros, it would be for the two months some millions of dollars.

MR. CICERO: Your Honor, we never considered the proposition of, number one, that you would continue the raises for some but elevate the others.

THE COURT: I don't know how you could escape consideration. That is what they requested in their motion papers.

MR. CICERO: When you sent me back with the internal relief proposal that I wrote down word for word, that is not what I presented to the commissioner of health.

THE COURT: But it was not accepted either.

MR. CICERO: Of course. My point is that is why we don't know the facts here. That is the only thing I was trying to say, your Honor.

THE COURT: The point is that now there has been no proposal accepted and we are now back literally to the request for injunctive relief in the plaintiffs' papers, and an obvious question which has to be answered is what will that cost.

Anyway, I am going to assume it costs X dollars and certainly it is somewhere between a million and five.

MR. CICERO: Absolutely, your Honor. That is safe.

THE COURT: I am telling you, Mr. Mantzoros, that I think there is good reason to believe that an order for an across the board restoration of those rates for November and December would be valid, would stand up in the Court of Appeals, and would cost the state whatever amount it would cost, one million, two million, four million, five million.

Now, I have been reluctant for a lot of reasons in ordering across the board relief, but the only reason I have been reluctant, and I have stated this many times, is that despite the lack of procedural due process that may exist, I have some reluctance in simply ordering the state or trying to order the state to pay millions of dollars when I am not at all sure about the state of the individual homes, whether they are indeed in emergency status or not. I am reluctant to restore the November 1 rates or pre-November 1 rates only to those homes who have had reductions when I don't restore, you know, the whole across the board. It is an anomalous situation.

To go back to what I mentioned last night, has the state got any suggestion for very speedy processing of any cases where it can be shown that the November -December situation cries for relief? And I mean quick.

MR. MANTZOROS: Right. That you are entitled to, your Honor. It is an excellent question. I would want to know it and I share it with you. To what extent, Dr. Cicero -- and I made a telephone call the morning and I wanted to do some more this afternoon -- passed only this situation, I share it, too. To what extent Dr. Cicero can answer that accelerated appeal processes to take care of that situation, whether he is prepared now or wants to do it later this afternoon or tomorrow.

We have two issues, November 1 and the appeals that you brought up last night. They are excellent, valid things.

THE COURT: What has been going on? I would be prepared to call around town and get a panel of special masters appointed, 12 of them, 15 of them, 20 of them, and immediately hear these cases so Mr. Stern's clients could come in immediately and present their facts and we could dispose of them, and I mean it.

MR.MANTZOROS: I wanted that and I told them.

THE COURT: I don't want to sit here thinking that some homes are out there who have been trying to get relief for over a month on what might be a very valid cause of action and simply because of the slowness of process they can't do it. I want to right now eliminate that.

MR. MANTZOROS: I agree with you.

THE COURT: I am very much inclined to grant an across the board increase. You have a choice.

MR. MANTZOROS: We were at Proskauer Rose last night. I put in a long distance call to Albany, long distance collect, and it is tough to do it on a pay phone, I want to do some more calling. I want to believe --

MR. CICERO: We are prepared to answer it.

THE COURT: What can you do? Suppose a hundred homes come in. What can you do to handle them?

MR. CICERO: Your Honor, before you answer that question we go back to that gritty issue, the issue of the state code.

THE COURT: I just talk about homes coming in and saying --

MR. CICERO: If you say to me tomorrow that the state does know the state code and when it told St. Cabrini to cut $8.26 without losing its state rating, you have no problem. We will commit outselves to do it. If you then talk about arbitration after that I can't answer your question, your Honor.

THE COURT: That is the problem. That is why I would appoint a master. To me you have your viewpoint, but you are not entirely objective. I mean as far as talking about the going to an Article 78, that is a long drawn out thing. We talked a long time about the St. Cabrini thing, and I am sure I can take evidence in this court and the St. Cabrini people could get on the stand and tell me why it is they should not make the staff changes that you recommend and then your people would get on the stand and maybe somebody would have to visit the home. I don't know what would be necessary. But it's a very important problem and it means thousands of dollars, it means a lot of jobs to nurses and on and on and on. It is not a very easy thing. So the question is -- incidentally, what is going to happen to St. Cabrini in the new rates?

MR. STERN: I think it is $2.29, your Honor. It does up.

THE COURT: I see.

Mr. Mantzoros, I just can't leave it with the edict of the state saying "Okay, Dr. Cicero says you accept my proposals or no go."

I just can't leave it at that. So I go back, what procedure do you suggest, if any?

MR. MANTZOROS: I want to talk to him about this. If you are going to appoint masters, I want to know why the department can't do it. I have to talk to him. I want to ask him some questions.

THE COURT: I mentioned the special master thing last night. I would be glad to start calling around town.

MR. MANTZOROS: I haven't had a chance to do that.

THE COURT: We will recess until 2:15. You talk over this. The thing I have in mind, Mr. Stern, is this, that it would give me, it would give the Department of Health, it would give everybody some device to deal with this problem on a factual basis rather than denying relief across the board or ordering relief across the board where we really don't know the facts.

That is what I would like to try to achieve. I don't like the idea of blindly ordering payments of money. I think almost anything, no matter how much work it is, is better than that.

MR. STERN: I would like to confer with my clients as well. If I understand your proposal to be a special master selected by your Honor would deal with the individual problems presented and that the state would agree to be bound by his decisions confirmed by your Honor so that the payments could be made, then I would seriously sell that one to my clients.

MR. MANTZOROS: I am saying I may have a solution. As far as masters is concerned that is if you have 55 or 56 and 65. I don't know that they can step in, and I had this in another case before, no master has been appointed in any case, and as I recall, I briefed it in another case, and I had about ten cases or fifteen with consent decrees but no court has ordered a master. I don't want to get technical. He is talking about we will agree with the master.

MR. STERN: Subject to your Honor's confirmation.

THE COURT: I really wouldn't quite put it that way.

MR. MANTZOROS: He said that.

THE COURT: I would immediately state this, that it seems to me that all the master can do is to make recommendations and the master would act as a fact finder and a recommender so that we know what the story is. Then the question would be is the recommendation made to the Department of Health or to this Court, and it seems to me, just thinking very quickly, that -- I would think ultimately the master's recommendation would be made to this Court.

I have in mind a rather speedy process here. So it isn't a matter of going through umpteen channels.

MR. STERN: Your Honor was sensitive that I said the state would agree, that your Honor's confirmation of the special master's report or adoption would not be subject to a claim by the state that your Honor was without the power to enforce the master's decree.

MR. MANTZOROS: I don't understand that. Either the Court has jurisdiction or it doesn't. I don't understand what you are talking about.

THE COURT: I understand what he is talking about.

MR. MANTZOROS: It is not a constitutional issue, if your Honor please. If the Court doesn't want to take all this burden, there is the state court.

THE COURT: I haven't heard any proposal from you.

MR. MANTZOROS: About what?

THE COURT: About the use of masters or any other brokers.

MR. MANTZOROS: There is no jurisdiction for masters. I have never seen that done.

THE COURT: Mr. Mantzoros, you take a recess this noon and you come back and you have a recommendation and I mean it had better be a substantial recommendation about how to cure the proceduarl problem which the State of New York created on November 1 by putting those reduced rates in without one link of notice. You tell me how you propose to solve that with a substitute procedure. I will let you use your ingenuity to come up with something that you --

MR. MANTZOROS: I accept it. I am also saying this, this preliminary injunction was a sabotaging of these rates. Please tell us, judge, not to comply with them. So it is both sides, the state and the plaintiffs.

THE COURT: You come back at 2:15.

(Luncheon recess)

AFTERNOON SESSION
2:25 p.m.

THE COURT: Have you got any ideas at the back table?

MR. MANTZOROS: I conferred. I walked back to the World Trade Center and it cut my time down.

THE COURT: What is the temperature out?

MR. MANTZOROS: 40.

I didn't have a chance to confer with Mr. Cicero. Perhaps he might have some views.

MR. CICERO: Your Honor, Mr. Webb and I -- Mr. Webb from the Commission of the Budget -- went to the state office building. I called the Commissioner of Health and we discussed it with all the appropriate staff. Mr. Webb spoke with the director of the budget.

We cannot mislead the Court, your Honor. We cannot process all 119 appeals in a twe-week period of time. We would be misleading you to say that we could.

At the very best, what we could hope to do, and I stress the word "hope" here, your Honor, is that we perhaps could process the appeals in a four to six-week period of time, assuming all material that is relevant and necessary to that review process was in our hands within a week to do it and with the further guarantee to the Court that we would of course start with those hurt the most severely.

I think, your Honor, from the state's standpoint that is basically what we have to say.

We would also like to add -- excuse me. Go ahead.

THE COURT: I think I would like to interrupt and go into the numbers because the significance of the numbers isn't clear to me.

Mr. Stern, can you tell me the total number of homes that you represent which got reductions in November? What is that number?

MR. STERN: 138, I am advised, your Honor.

Excuse me, your Honor. Approximately 158, your Honor.

THE COURT: 158 non-profit homes got reductions?

MR. STERN: That is correct.

THE COURT: Are those 158 listed in Exhibit 16 and the exhibit to the supplemental Waife affidavit? If I counted those up would I get 158?

MR. STERN: You would get 138, I believe, with the addition being hospital based homes that were not included in that list.

Exhibit 3 to the Waife affidavit, your Honor, includes hospital based homes. That should be about 158. What was marked as Exhibit 16 does not include hospital based because we did not get that informationfrom the state last night.

THE COURT: So you would say that the total number of homes you are representing would be 158 that have gotten reductions?

MR. STERN: Yes, your Honor. That is facilities, your Honor. I am told the way the state defines it, a health related facility and a skilled nursing facility would count as two but in fact in some cases they were combined in one home but the rates are separate. So that whereas some home might have gotten an increase in its skilled nursing facility, we didn't include that home. If it got a reduction in the health related facility it was included as a loss.

THE COURT: In Exhibit 16 for identification and in exhibit 3 to the Waife supplemental affidavit you have got two schedules, one skilled nursing facilities, one health related facilities and actually you have got a hospital based nursing homes schedule for that.

MR. STERN: In Exhibit 3.

THE COURT: You have three schedules.

And inExhibit 16 you have two of those three schedules?

MR. STERN: That is correct.

THE COURT: Omitting the one about hospital related?

MR. STERN: Right.

THE COURT: I don't have to get too precise here but I am trying to think how many institutions we would have to worry about as far as appeals. Recognizing you havethe two types of facilities within one nursing home, possibly, can you give me any idea of the number of nursing homes -- the number of separate institutions that you represent?

MR. STERN: Who got reductions?

THE COURT: Who got reductions.

MR. STERN: Dr. Cicero mentioned a number of 119.

MR. CICERO: That is our best estimate.

MR. STERN: I have no reason to doubt that.

THE COURT: Let's take that. What I have in mind, Mr. Stern, is that as far as this Court's activity is concerned, I still am worried. I have before me technically and really a motion for a preliminary injunction, and so in my own thinking about this I return to the standards for preliminary injunction.

Maybe at this point that isn't the best way to approach it but let me just follow this through.

When we started the inquiry about the condition of the homes many, many hearings ago, I was trying to focus on finding out where emergencies were, where we had situations of irreparable harm if injunctive relief weren't granted. That is why I asked the questions I did about when the next checks were expected and when they would expect to stop paying salaries and this and that.

Now, we all know that anybody who received a reduction, received a reduction and that is less money. We know ultimately some Court of institution may say that was invalid. But I am back to my question is who deserves injunctive relief, if anybody?

Let's just suppose there was a home running at a break-even and it got a minute reduction so that it really was not suffering substantial losses, there was no threat of it having to close pending the outcome of this litigation and so forth.

If that was the only home suing for preliminary injunction, I wouldn't grant it. It doesn't mean I would dismiss the case but I wouldn't order the extraordinary relief of preliminary injunction. I don't think I would.

On the other hand, if I had a home coming in, and I keep going back to St. Cabrini, which tells me they are four months behind in paying the milk bills, they only have two months more before they quit paying salaries and the state comes along and says the only way you can save yourself is fire 37 people and replace them with other type staff, that is the case I would be concerned about in the case of a preliminary injunction.

I wouldn't want that resolved in some way because if I have jurisdiction of the case, which I think I do, I wouldn't want to see St. Cabrini simply close up because of confusion about whether they should fire or shouldn't fire. That is the kind of a case where I would think there should be quick resolution one way or another, should they fire, should they not fire.

What I am getting at is this: Out of this 119 I suppose what Dr. Cicero is envisioning is every single one of the 119 come in and appeal. Well, if they want to all come in and appeal, they have got a right under the state law to appeal and there is nothing I can do to stop them. But as far as my case, my responsibility, is concerned I am interested in those cases which deserve a preliminary injunction in a federal district court.

I think it all adds up to this, that I think whatever procedure is adopted you ought to find out the cases that are worse off, people that are screaming they are about to close and that kind of thing, and there ought to be some selective means of taking the worst-off cases and getting them processed and see whether they need relief or don't need relief and whether that is done in Dr. Cicero's department or done through a special master or done by me personally, I will put that aside.

Is there any idea you can give us of the cases which you would say involve emergencies, how many?

MR. STERN: I would be misleading your Honor if I came in with a definitive analysis. I have gotten so many calls of emergencies with respect to particular clients, but I have not analyzed it on a basis beyond the five plaintiffs. We have the data with respect to reductions in rate which I think is a good indication.

One of my problems is -- obviously one response I have is it depends who is making the decision, whether it is your Honor or a special master on the one hand or whether it is the State Department of Health on the other.

The other one is that while this is pending and hopefully we will have a trial at some early date, that homes that are told them should fire particular individuals, what do we do if in fact the standard that they were required to fire those people because of, in other words, they had to eliminate $600,000 worth of costs to get down to a rate which is ultimately held to be illegal, that is the dilemma I have.

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THE COURT: I thinkyou made that point very forcefully and it is a valid point.

What I want to contrast is a situation -- and I am speaking hypothetically because I don't know about this -- but let's suppose there is a situation where the rate reduction that occurred in November was relatively small and where the increase in January is going to take it up. There are many cases where the January rate will be even above the old rate.

Hear me out, please. In other words, I am sure that there are at least some cases where nobody is really threatened with having to fire personnel or change their method of operation either because the rate reduction was so small or because they are fairly well taken care of by the January increase or through some other thing. Maybe they had some reserves or something.

It doesn't mean that ultimately the state won't owe them some money. I am talking strictly here about interim relief.

Now, those cases are the ones that at least initially I don't think should be clogging any of us up and those are the cases where the people aren't threatened with changing their pattern of operation in a way that might ultimately be held illegal.

I am worried about the kind of cases you mentioned where the reduction in rates is so substantial and so critical that either the home goes out of business or else it radically changes its method of operation, people are fired and maybe we end up five months from now realizing it was all illegal.

I am worried about just the same thing you are worried about. But those are the cases that I would say fall in the emergency category or the critical category or whatever you want to call it and should come forward to whoever is going to find the facts, present their cases, get findings of fact made soon and get a determination as to whether they are supposed to get some form of relief or not.

If you could do this, I think no matter how you slice it you want to present the worst cases, whether it is to me, to Dr. Cicero, to a special master. The worst cases should get presented quickest.

MR. STERN: Your Honor, it isn't in terms of the effort based upon past experience. Based upon past experience we have a different concern vis-a-vis the state. If we get involved in this and it is a good idea, we cross out the 24-cent homes that went down or 50 cents, or something like that, and we actually get involved in the kind of analysis which your Honor thinks is necessitated by looking for emergency situations and we are doing this on a cooperative basis, would it ill-behoove the state to pick out those homes in that category and say pending resolution those particular homes that we have identified with your Honor's assistance are paid at the older rate with a provision for recoupment by the state over an extended period of time?

THE COURT: I don't know the answer. If you recall on St. Cabrini we got this far: we had a presentation of Dr. Cicero's statements as to what his findings were. We didn't hear any rebuttal from your client.

So just taking the St. Cabrini home itself, as far as this court is concerned one side of the picture has been presented. O.K.

Now, I have some faith that whoever it is that hears both sides will be able to come up with some sensible idea of whether this reduction in staff is well advised or not well advised. So where does that lead?

I guess what you are saying is that even if the smartest nursing home expert in the world could say that that staff reduction was well advised and a good idea, still you might end up getting back your old rate so it wouldn't have been necessary.

Well, that isn't a very appealing position because I would kind of have the gut reaction that if a staff reduction is well advised it should be made and probably if it is well advised and they can live within the new rates, there isn't a heck of a lot of justification for the old rates and there is not a lot of reason to grant a preliminary injunction or any relief ever.

I know that we aren't going to have some supreme genius on nursing homes, the omniscient genius, looking at this, and I know whoever makes any decision, it can be subject to controversy, but at least we will know more than we do right now. So I just would give it a try.

MR. STERN: Your Honor, just before we broke for lunch your Honor had suggested that the only application for a preliminary injunction that was here was to restore the reduction, and you asked me whether a procedure such as you envisioned with special masters under your Honor's jurisdiction was one that we could do expeditiously and as a matter of agreement so that you were not confronted with that. And you once again turned to the state -- again I emphasize -- to voluntarily come forward and deal with this problem, and they really haven't responded to your Honor.

THE COURT: I can only deal with one step at a time.

MR. STERN: We can identify homes, your Honor, if we are faced with a proceeding before your Honor or a special master which we, based upon our best information, would decide, after conference with a group within ourselves, are those which need the help to the greatest extent.

THE COURT: That is step one. I think it is agreed by everybody in this room that the problems of such homes need attention by somebody. Now let's get to the somebody. That's critical.

Let us suppose, for instance, Dr. Cicero, that out of the 119 -- let's just pick a figure out of thin air -- let's suppose there were 30 that, after really good-faith selection, the plaintiffs' lawyers would say these are the ones that really need emergency consideration.

Now, we know, sitting here, there could be many more than 30 or there could be less. But let's pick 30. I don't think Mr. Stern could possibly be expected to come forward with a statement of the number right now. Let's say it was 30.

How quickly could you process 30 within your place?

DR. CICERO: Your Honor, given the number 30 and given the one other factor, your Honor, I think in particular Mr. Waife will understand what I am saying, and that is a presentation to the state or to whoever will do the reviewing, the documentation needed to make the analysis, given that set of circumstances, I think we could process 30 in two to three weeks, and I have to put a "perhaps" because there may be this, that and the other thing. I am talking about slicing our four to six weeks basically in half if you are talking about after we receive the documentation.

THE COURT: The procedure which we were going through that week when you were reviewing the five or so cases and you came back to court at the beginning of the following week with findings of fact, now, that was done, understandably, in extreme haste. So I am not saying what I say now in any spirit of criticism whatever. But I must say that that was not anything that I would consider a real adjudication because, if I am correct, it was a matter of the homes coming in, putting forth whatever they wanted to put forth, then your department put forth your recommendation and in a case like St. Cabrini, where there was just a disagreement, there wasn't any machinery gone through, and there couldn't be in the time -- I understand that -- but there in fact wasn't any machinery to have that adjudicated by an objective mechanisn. So what I would think would be an objective mechanism would be that some objective person would really somehow look into the St. Cabrini home, visit the St. Cabrini home, size up the thing, evaluate the two sides and come up with some recommendation. You hadn't had time to do that.

But I am wondering if there isn't more to the question of time. This is where I come to the special master. Let us suppose we have some homes that really are in an emergency situtation and we know that time is of the essence. If they are simply to go to the Department of Health, the Department of Healty is really an advocate here and the Department of Health has its own pretty strong views and I question, with ny disrespect, whether the Department of Health people are really objective.

Therefore, I am really wondering whether in order to get these cases dealt with in the quickest, most objective, efficient fashion, whether it might not be a very good idea to use the special master and get a special master in and maybe get more than one in and have him here, both sides come up with a recommendation.

Again I say the state probably says "This is not normal, this is not the way we do it."

So I only remind you that I don't think we aer in a normal arena, quite. We had what I regard as a rather abnormal procedure on November 1 when rates were reduced without any notice.

What about the special master idea?

MR. MANTZOROS: If I may just help in the overall picture, the fastest way, and it could have been done, they to claim illegality in the state court in Albany, they can do it in two days with an order to show cause and get their answer in two seconds without having to do the constitutional thing. They can get their relief like Mr. Lowell is going to do. They are using the constitutional level and it will not reach it and these insurmountable obstacles are causing delay. If there was an emergency, they could have gone in the last four, five, six weeks to the state court on Article 78.

I could consolidate all the cases and get an answer. I am not objecting. There is a mechanism. It's there, it's fast. Order to show cause, Article 8.

THE COURT: You be their lawyer. What should they do now? YOu give them some legal advice.

MR. MANTZOROS: If I may do that.

THE COURT: Talk a little slower so I can understand you.

MR. MANTZOROS: They claim, for example, the 60 days. I think that may have come up in one of the other cases. They present that to the state court in an order to show cause for this reason the 60-day notice was not given to the plaintiffs: two, they did not consult, as they have alleged in the complaint, with some commissioner or whatever itis, therefore it should not go into effect and the state court can rule on that in five minutes. It's on its face. There is their relief.

Here they are going into insurmountable allegations which they must meet and they can't meet and I had to use the extreme language, sham. They will have extreme difficulty in meeting the allegations that are required in the federal court for 1983, 1343 jurisdiction,, whereas like in 1983 assault and battery, the state court is there and can take care of it. Here they are coming into this court on constitutionality. They don't rise to that level.

THE COURT: The answer is you have nothing whatever to say about a special master?

MR. MANTZOROS: I say this Court would not have jurisdiction in the first place and that will be on appeal, oto, as to the special master. They can't substitute a hearing officer for the hospital code. The hospital code is their responsibility.

THE COURT: I want to examine it from a practical standpoint.

You have got these homes and they want to present their emergencies. Now, what Dr. Cicero says is that under normal procedures they have every right to appeal and he would entertain these appeals and try to process them as quickly as possible and the most emergent cases would come up first, and so forth.

You have to weigh that, which I know has some things you don't like, gain being very realistic, you have to weigh that against the alternative which we have discussed, and that is the appointment of a special master.

I am the one who brought up the special master. Nobody is applying for it, nobody has briefed it.

A third alternative, I guess, is just blanket relief. I am not coming to that for a minute.

The special master has advantages in that the special master is an officer of this court and presumably may have more objectivity than the Department of Health. At the same time, the special master doesn't have the expertise that the Department of Health people have, and even though the Department of Health people may have their axes to grind, they are a lot more expert in this than anybody I could probably bring it. So I think it is a subject for you to think about seriously and for me to think about seriously as to what route to go.

After all, we are now dealing with a two-month period.

MR. STERN: We have narrowed the issues and the time span with your Honor's guidance and we have attempted, I think, until this point, collectively, valiantly attempted to adjust this so your Honor could enter an order upon consent and not be forced to make the decision.

But based upon the procedures of the Department of Health and what we allege in our complaint to be budgetary considerations which they operate under in the best of faith but they are there because they are the very reason upon which we base some of our complaint of illegality, they are not the independent tribunal, your Honor. Indeed, there are health care experts, I am advised, independents, who could be put into a special master situation.

THE COURT: Who?

MR. MANTZOROS: You have Article 87, if your Honor please, and this is not a receivership. That

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is what he is asking for is a receivership. The Supreme Court won't stand for that. That is why we have Article 78. That is the purpose of Article 78, administrative rule.

MR. STERN: If I were to follow Mr. Mantzoros's advise --

THE COURT: Don't talk about his advice. You talk about the practicalities.

MR. STERN: I am advised there are a number of hospital consultants who are expert in this area, your Honor, but if the state does not consent, your Honor, so that they are not agreeing in advance to pay any amounts that are ultimately determined by the hospital consultant to be due, we are back to some issues that we discussed earlier.

So that the question is whether we do it on consent or whether we, having narrowed the issues to November and December and having asked the state and asked us to see how far we can go, you know, I don't think the state is trying hard enough to take your Honor off the hook, frankly.

THE COURT: I don't want to get taken off the hook. I don't want you to say that.

MR. STERN: We should agree with the state upon a procedure because we all agree that these homes should be given some special treatment by an impartial party, and I say that that is a fair way based upon special circumstances, as y[illegible] Honor properly pointed out, that it wouldn't necessarily be an emergency in this case or quite as much an emergency with a 24-cent reduction.

So we have gone as far as the special master. We will agree to that, your Honor.

Your Honor has talked about how it is better to go through normal procedures upon agreement. We are trying to do that. But if it just Dr. Cicero who only an hour and a half ago said, "We are ready to give these homes raises if they agree that they accept our decision, that is O.K. for us," that is the attitude of the state.

I understand the constraints Dr. Cicero and his department are operating under, but we cannot agree to that.

DR. CICERO: I wanted to add, your Honor, I was referring to, and still, meeting the state hospital code, the highest code in the country, your Honor. I never want the Court to be misled on that point. That is what my instructions were to 90 people when they reviewed these homes, your Honor.

THE COURT: I have this further thought. What Mr. Mantzoros is saying, and I perfectly well understand it, is that for this Court to talk about special master does go contrary to the formal procedures. I am fully aware of that and do not have to be reminded of it.

I am fully aware that the normal procedure for an appeal would be to the Department of Health, followed by an Article 78 proceeding in the state court, and if we were dealing with what I will call a normal situation, that would be just perfectly fine.

The only reason I fell I have jurisdiction here, the only reason I have any thought of possibly doing something extraordinary is that the state acted in a way which may very well have been a violation of procedural due process in the first place, and the point is to do something to remedy that.

If I didn't believe there was a process problem in the first place, I wouldn't stand one minute worrying about some extraordinary process to remedy that problem.

Now, Mr. Mantzoros, you may disagree, you are entitled to disagree, you may think there is not even enough of a violation of federal due process to even talk about here, but that is your viewpoint. You are entitled to it. I simply disagree with that.

MR. MANTZOROS: They haven't attacked the statute that provided the procedure which was Section 16. They haven't said anything about it. Section 16 says no 60-day notice, which they knew about since April 1. There is absolutely no procedural due process.

THE COURT: That is your view and you are perfectly well entitled to it.

MR. MANTZOROS: The Supreme Court of the State of New York would have jurisdiction over the legality or constitutionality of Section 16 of Chapter 76.

THE COURT: You fail to understand anything I say.

MR. MANTZOROS: I understood everything your Honor said.

THE COURT: I am not going to keep repeating it. That's that.

I think as far as I am concerned we have narrowed the issue to be decided to the question of what procedure to adopt to take care of emergency cases.

Rule 53 provides that a district court can appoint a special master, can impose the compensation on such of the parties as the Court may direct, and so forth.

MR. MANTZOROS: That is for the computation of damages, if I may suggest, your Honor. I have been in Rule 53 cases and it is not for determining this type of relief. It is for a determination as to equity and how you compute damages. I have been through it. The annotations show it. I am just inviting the Court's attention to it.

THE COURT: I don't see any limitation.

MR. MANTZOROS: This is not a receivership. If the Supreme Court says thefederal court can take over the state, so be it.

THE COURT: I have heard this many times. You said it about three times. Let's make some progress.

MR. STERN: Your Honor, we have only narrowed the issue --

THE COURT: Wait a minute. I keep using the overly used word "practical" but that is the way I view this. The question is what is going to be most expeditious and what is going to be most practical to resolve this particular problem.

I am not all clear. We have talked about the advantages and disadvantages of having a special master or a team of special masters versus havingDr. Cicero's people do the work. I don't really know. But since you are now receptive to the idea of special masters --

MR. STERN: Upon consent of the defendants, your Honor.

THE COURT: Then you are not going to get their consent.

MR. STERN: Mr. Mantzoros has been shouting Eleventh Amendment.

THE COURT: Let's cut down oratory. We are not making progress.

In other words, you would not apply to the Court for an order appointing one or more special masters even if the Court imposed the cost on the state?

MR. STERN: I think the state's position will be that insofar as the special master directs the payment of money, the repayment of money, outside of the preliminary injunction status or status quo as opposed to one rate or the old rate, that they will raise forcefully the Eleventh Amendment argument, which I have not considered to this time but I would acknowledge that it is more troublesome to me than in the preliminary injunction context because then you would have a specific direction to pay money.

I don't concede the point, but I did accept the master concept in an effort to show that we were not trying to get monies somehow and that dollars was not our sole purpose in being here but cuts and other concerns that we voiced in our complaint. But if the defendants can't meet us halfway on that, then I don't apply for the special master, I apply for the same relief that is given in all of the freeze cases when a freeze is held to be illegal. You put in the old rate and that is the application I would have to stand on if they don't meet us halfway.

THE COURT: O.K., that clears that up.

Do you think I would be justified in obtaining relief of the reinstatement of the old rate for those homes that got a reduction?

MR. STERN: The very court to which Mr. Mantzoros would have sent us to bring this action felt empowered to enter such an order in another case. The Appellate Division, Third Department, enjoined the retroactivity of these rates insofar as they effected reductions. That was the Kaye v. Whalen opinion by the Third Department. So that we are not asking for an extraordinary, unheard of relief, and if there was some buffer, your Honor -- this may not behoove class counsel, but if there was some buffer, like 75 cents a day or something which your Honor felt was just too little to matter, I could understand that and say all reductions greater than a certain amount, something along those lines.

So we are not in just with a claim to grab every penny because we caught the state in a procedural problem. That is not our concern. We are willing to deal with the practicalities of the situation.

In the light of what has developed, we submit because of the state's intransigience we stay with our request for the reduction and we think it is not an unheard of remedy at all.

MR. MANTZOROS: I reject "intransigience." In state court we never raised any objection.

THE COURT: Mr. Stern, let me pursue this with you.

In the first place, I want to say that I appreciate I think today you have been extremely cooperative and I think that your willingness to have this resolved on a case-by-case basis and to try to go to some form of individual was really very fine. I appreciate it.

That hasn't been agreed to, so you are not going to apply for that, at least the special master route. So we will drop that.

I have to come back to you, and I hate to prolong this, but we do have, as of today, a different situation as far as preliminary injunction than we had yesterday or the day before because -- and I have to zero in on this -- we have a situation where I think you have taken the position this morning that as far as any relief for the period beginning January 1 you are not prepared really to take a position now in view of the state's change of rates as of that time. So you are limiting your discussion before me right now to the problem of whether you are entitled to preliminary injunctive relief for the months of November and December.

MR. STERN: Yes.

THE COURT: Now, you said you agree to that?

MR. STERN: I agree with that.

THE COURT: I raise the question in this fashion: have you made a showing of the necessary elements for preliminary injunctive relief for November and December? In other words, have you made a showing that you are entitled to a preliminary injunction reinstating the old rates to the disadvantaged homes for November and December?

That is a somewhat different question than we addressed previously when we were thinking about period of time greater than November and December.

That raises the question, is there a showing of irreparable harm by not getting an injunction for November and December or is there a showing that the balance of hardship weighs? So whether you are talking about irreparable harm or you are talking about hardship, I have to consider, on an application for preliminary injunction with respect to November and December, I have to consider the harm or the hardship that is rendered to these homes by not having an immediate order reinstating rates for those two months.

I can't say that I can sit here and have any kind of clear picture on those questions.

MR. STERN: Your Honor, the balancing of the hardships I think has to be viewed against the context that the state has in many cases recouped substantial amounts of money over a long period of time by monthly payments from homes found to be owing the state money. So that if we maintain the status quo with this injunction by keeping the rates at the old rates and it was ultimately found that these rates were legal and that their manner of implementation was legal, which is even bigger, because the 60-day notice would bring us up to January 1. There are two separate questions of illegality. But if it was found that theprocedure was legal and if the rates themselves were legal on the merits, then the state is in a position to recoup from the plaintiffs the monies that result from this very finite identifiable period.

THE COURT: That isn't --

MR. STERN: Balancing the hardships is what you address yourself to.

THE COURT: You have the burden of showing either irreparable harm or hardship.

Let's get down to cases. Let's take Cabrini. How much would Cabrini get back for November and December if I reinstated the November rates?

MR. STERN: $50,000 a month, your Honor. And St. Cabrini, by the way, has irretrievably lost part of October recause the state violated the Appellate Division's order and paid October rates at the new rate despite their commitment here to your Honor that they would not do that either.

MR. MANTZOROS: Let them go to the state court for relief. Besides the balancing --

THE COURT: All right, Mr. Mantzoros, there has to be a lot of order here. You pop in in every instance with some reply. I assume you have a reply to everything.

MR. MANTZOROS: Yes, sir.

THE COURT: Please. I am addressing Mr. Stern.

I am just looking at my notes. Give me a minutes.

(Pause.)

THE COURT: How do I get the $50,000 a month? I was looking through my notes and somehow I can't find that.

MR. STERN: Mr. Fisher, the assistant controller of St. Cabrini, is here.

THE COURT: Mr. Fisher, can you help me out?

MR. FISHER: Yes, your Honor.

THE COURT: Mr. Fisher advises me it is $25,000 a month, $50,000 for two months, your Honor. Actually it shows on a separate piece of paper he has $47,000 for the two-month period.

MR. FISHER: Except that in the month of November, your Honor, when this schedule was prepared --

THE COURT: What schedule have you got? Is that something that is in evidence now?

MR. FISHER: No, your Honor. It was merely a calculation to determine the effect of the rate.

THE COURT: How did you calculate what you have calculated? What did you do?

MR. FISHER: In the case of November, since this was calculated on the 24th of November, we only took admissions and discharges from November 23rd. We did not have the balance of transactions for that month. We took the billings to Westchester County and to the City of New York, determined what the billings were at the October 31st rate, determined the effect of the November 1st rate on those billings, and came up with that for the month of November.

This is taking into account admissions and discharges through November 23rd, our billings would be reduced by $22,975.

THE COURT: By the new rate?

MR. FISHER: Application of new rates.

THE COURT: What is the figure?

MR. FISHER: $22,975.

THE COURT: Can you carry that through to the end of the year?

MR. FISHER: I have a calculation, your Honor, for the full month of October, because at that time we did not know what the status was, which was $24,155 --

THE COURT: When you say October, I don't know why we are talking about October.

MR. FISHER: Because at that time, your Honor, we did not know the status of our October billings. So I had done a calculation for these two months in November.

MR. STERN: October is a full month. So that he thinks that December would be the same.

MR. FISHER: It is a typical month. The effect on my October billings was $24,155. Assuming that would be a typical month, two months' billings would affect me to the extent of $48,300.

THE COURT: Give me that figure again.

MR. FISHER: $48,300.

THE COURT: How do you get 48?

MR. FISHER: I am doubling the October effect.

THE COURT: $48,300.

How does that fit into your overall financial condition?

MR. FISHER: It does impose a hardship, your Honor.

THE COURT: It what?

MR. FISHER: It does impose a hardship.

THE COURT: Suppose you got paid right now the $48,300 extra for the two months, what does it do to your financial condition?

MR. FISHER: It takes a little of the burden off us or pressure of meeting our commitments to vendors.

THE COURT: You told me that there was a cash loss for the nine months of fifty thousand --

MR. FISHER: Not fifty thousand, your Honor.

THE COURT: Cash loss.

MR. FISHER: Yes, after taking out depreciation

THE COURT: Cash loss for November and December, we are not figuring retroactivity now.

MR. FISHER: Right.

THE COURT: Cash loss for November and December, 70,000 at the new rate, you said.

MR. FISHER: Right.

THE COURT: Then you said October you figured a cash loss of --

MR. FISHER: The new rate would increase that by 24,000.

THE COURT: In other words, I think you said that the total year cash loss would be $150,000, applying the new rate beginning November 1. I think that is the figure you gave me.

Does that sound right?

MR. FISHER: About correct, your Honor.

THE COURT: Cash loss. Of that $150,000, about half of it was incurred before November, right?

MR. FISHER: That is correct.

THE COURT: Let's take a short break.

(Recess.)

THE COURT: Let me bring today's session to a close as follows:

The net result of our decision I think can be summarized this way. The state has come forward with rates which will go into effect January 1, 1977. The specific rates have been circulated last night, have been reviewed, schedules drawn up, presented to the Court. So, as far as the situation beginning January 1, 1977, we have a new set of facts.

Those facts will be reviewed by the plaintiffs' lawyers and their clients to see what conclusions they draw from them or what remedies or whatever they feel is appropriate to do.

It is obvious from our discussion as of the present moment no application for preliminary injunction as to the period beginning January 1, 1977, is being pressed insofar as obtaining any immediate ruling, and even if it were being pressed I would deny it because I just could not give any injunctive relief about a new set of circumstances which has not been analyzed. So for my purposes at the moment, the situation beginning

January 1, 1977, is simply put aside.

The discussion this afternoon has related to the period November and December, and we have had both off the record and on the record discussions with counsel all through the day about that.

The idea of granting a preliminary injunction as to the period November and December is again a new idea which has been posed today, and I would need to consider that and I know that everyone is pressing for quick decisions and nobody likes at this point to be told that there has to be further consideration; but I can guarantee you that I will not fire off any ruling right away without consideration as to any of the radically changed circumstances that have been posed as of today.

I regard any application limited to November and December as a radically different application than was presented before, and I will refrain from issuing any ruling without further thought and possibly further consultation with counsel.

Whether these developments have been the result of the litigation or whether they would have taken place in normal course I won't try to speculate, but the fact is that since the commencement of the litigation the state has done a dnumber of things.

The state has at least started to process some of the complaints by individual nursing homes at an accelerated rate. The state has proposes increased rates for most homes commencing January 1.

So a lot has changed since the commencement of the litigation, and I won't speculate as to the exact causes. These are the facts.

Now, the state has given assurance today and I think it gave assurance before -- when I say the state now I am talking about the Department of Health -- that agency has given assurance that it will do its best to give expeditious treatment to any appeals by any of the nursing homes or other facilities involved in this action whose rates were lowered as of November 1, and I understand it to be the representation of the Department to me that they will give consideration to any particular problems relating to the November-December period.

Right, Dr. Cicero?

DR. CICERO: We will do our best, your Honor.

THE COURT: In other words, if somebody comes in and says, "I have a particular problem because of the lower rates in November and December that causes me financial difficulty," that will be considered, right?

DR. CICERO: Yes, it will, your Honor.

THE COURT: I believe that it would be constructive and I think it will continue what I regard as constructive steps in this litigation to do the following, and I am directing that this be done:

Mr. Stern is to immediately consult with his clients and to obtain information of the kind we were talking about earlier in the afternoon, situations where there are cases of financial emergency or critical need created by the reduction in rates which is in effect for November and December.

He is to, and I am sure he would, make a good-faith effort to screen the situations which we talked about earlier which involve critical need or emergency from those situations which do not, and I think we defined that to some extent earlier.

He is to present the critical need or emergency to Dr. Cicero's department, and we will see how many they are, and Dr. Cicero is to work out a plan for the most expeditious handling possible of those appeals or complaints.

I think it has been expressed earlier today that when that is done -- it would involve more than that very quick treatment that was given a week or so ago, resulting in the findings of fact, and I think I have already expressed this, that the state was trying to come up for the purposes of furnishing me with a very quick analysis, and it really wasn't an objective adjudication of both sides of the controversy.

What I have in mind now is the Department will make a good-faith effort to hear both sides of the controversy and will come up with as objective an adjudication as possible of the problem.

Those are immediate and orderly steps which can be taken, and I expect them to be taken. I would like to be apprized of the information that is furnished -- let me start again.

I am willing to have whatever further hearings are necessary to keep me apprized of the progress. On the other hand, anything that is agreed to, and we don't have to have a hearing, that is less bother for all of you.

So I leave it to you, Mr. Stern, in the first instance. If you feel that by obtaining the emergency or critical cases from your clients, listing those cases and submitting them to Dr. Cicero, if you feel it is sufficient to simply send me copies of things and work out a schedule of hearings with Dr. Cicero and his staff and you don't need my intervention, that is fine.

On the other hand, I am certainly available to do what I can to expedite this process, and I certainly want to be continually informed of what's going on. So I leave the exact minute details of the procedure somewhat in abeyance for the moment.

The reason I do it is this, that we don't know exactly how many cases you will come up with, so the precise needs are not quite known, and I think we have to play it by ear to some extent. I will do everything I can to help you in this process. That's the best I can do.

As far as the preliminary injunction motion, it seems to me that the matter simply has to be given further thought. We have got new developments today and no decision can be made.

I further say, Mr. Stern, if you believe it would be helpful to make this rather confused thing a little less confused to your clients, I would be very happy to hold a hearing at which all of them can come to New York and we can get a big courtroom or we can get an auditorium some place and I will speak directly to your clients or their representatives, if you think that wouldhave any possible utility.

These proceedings have been fluid. They have not been just a matter of a few, simple, blunt rulings. If that creates any misunderstanding or misimpression to your clients, I would be most happy to have a hearing in which they are all invited to attend and I can try to explain the situation to them.

We will adjourn now.

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STATE OF NEW YORK - DEPARTMENT OF HEALTH

HOSPITAL MEMORANDUM . . .

1772

Series - 76-116
Date - 10/31/76

NH-34; HRF-34

Plaintiffs' Exhibit 15

SUBJECT: Residential Health Care Facility Reimbursement Rates of Payment for the Period January 1, 1976 through December 31, 19

Attached are schedules listing the reimbursement rates of payment to be made by governmental agencies in New York State for public charge patients in residential health care facilities. These rates are effective for the period January 1, 1976 through December 31, 1976, except where otherwise indicated. They are all inclusive reimbursement rates for services rendered by the facilities, and, therefore, no extra payments are to be made to any facility for services rendered.

The rates appearing in the attached schedules have been developed in accordance with Article 28 of the Public Health Law, as amended by the 1976 Legislature, and subpart 86-2 of the Commissioner of Health's Administrative Rules and Regulations, and approved by the New York State Director of the Budget.

These rates replace the interim rates of payment that were previously transmitted in Hospital Memorandum Series 76-6, 7, 8, and 9 dated 1/9/76.

Any inquiries in connection with the above or the attached rate schedules should be addressed to the Bureau of Reimbursement Rate Setting, Empire State Plaza, Tower Building, Albany, New York, 12237.

William F. McCann
William F. McCann
Assistant Commissioner
Division of Health Care Financing

Endorsement: Frank T. Cicero M.D.
Frank T. Cicero, M.D.
Second Deputy Commissioner

Attachments

1773

NURSING HOMES

Schedule of Rates

Period: 1/1/76 - 12/31/76

Region: WESTERN NEW YORK REGION

County Name of Facility	Daily Rate		Monthly Rate		Services Included
Allegany County					
Wellsville Nursing Home....................	$28.23	29.35	$ 859.00		A,B,E
Cattaraugus County					
St. Joseph's Manor....................	24.76	25.89	753.00		B,C
Salamanca Nursing Home....................	31.72	32.91	965.00		
Chautauqua County					
Fenton Park Nursing Home....................	30.43	31.65	926.00		B
Gerry Nursing Home Company,Inc....................	35.44	36.76	1078.00		A,B,D
Lakeshore Nursing Home....................	34.06	35.64	1036.00		G
Lutheran Retirement Home....................	33.61	34.92	1022.00		B
Manor Oak Nursing Home....................	27.12	28.20	825.00		B,D,F
Margaret-Anthony Nursing Home....................	25.71	26.87	782.00		
e County					
Abbey Nursing Home....................	23.26	24.33	707.00		
Abbott Manor Nursing Home....................	28.22	29.54	858.00		
Amherst Nursing &Convalescent Home....................	25.89	27.06	787.00		A,B,C,D
Aurora Park Nursing Home....................	31.71	34.30	965.00		B,C
	32.95	42.06	1002.00	6/7/76	B,C
Brothers of Mercy Nursing Home....................	40.46		1231.00		A,B,C,D
Bryant Manor Nursing Home....................	9.28	41.51	282.00		
Carroll Nursing Home....................	18.72		569.00		
Delaware Avenue Nursing Home....................	27.05	28.32	823.00		B,C,D
Downtown Nursing Home....................	38.30	41.52	1165.00		G
Fiddlers Green Manor....................	25.75	26.78	783.00		B,C
Furgala Nursing Home....................	37.57	37.68	1143.00		B,C
	37.64		1145.00	4/1/76	B,C,F
	35.58		1082.00	7/1/76	B,C,F
	36.28		1104.00	8/1/76	A,B,C,F
Georgian Court Nursing Home....................	29.53	30.91	898.00		
Grand Island Manor Nursing Home....................	38.82	40.48	1181.00		A,B,C

A Prescription Drugs
B Physical Therapy
Occupational Therapy
D Speech Therapy
Physician Services
Dental Services
G All Inclusive

NURSING HOMES

Schedule of Rates

Region: WESTERN NEW YORK REGION

Period: 1/1/76 - 12/31/76

County Name of Facility	Daily Rate	Monthly Rate	Services Included
Erie County (cont'd.)			
Jennie B. Richmond Chaffee Nursing Home......	$37.60 37.53	$1144.00	G
Manhattan Manor Nursing Home............	28.44 29.65	865.00	
Manor Oak Nursing Home............	26.50 27.41	806.00	
Nazareth Nursing Home............	35.90 37.52	1092.00	A,B,C,D
Niagara Frontier Nursing Home............	38.53 41.39	1172.00	B,C
	39.77	1210.00 2/1/76	B,C
Niagara Lutheran Home............	28.58 29.94	869.00	B,C,D
Orchard Park Nursing Home............	27.72 28.98	843.00	C
Pavilion Nursing Home............	31.77	966.00	
Presbyterian Homes of Western New York.......	30.87 32.25	939.00	
Regency Rest Home............	17.86	543.00	
Rosa Coplon Jewish Home and Infirmary........	42.63 44.40	1297.00	A,B,C,F
Seneca Manor Nursing Home............	31.67 32.98	963.00	
Sheridan Manor Nursing Home............	31.58 32.88	954.00	B,C,D
St. Francis Home of Williamsville...........	26.74 28.50	813.00	A
St. George Nursing Home............	23.34 24.44	710.00	
-Del Nursing Center............	31.27 32.57	951.00	B,C,D
ode Island Street Nursing Home Co,Inc...	36.36 37.73	1106.00	
Wheel Chair Home............	26.41 27.61	803.00	
Brothers of Mercy Nursing Home- Non-occupant Services............	10.76 11.29		G
Grand Island Manor-Non-occupant Services.....	10.98 11.52	P/T ONLY	B
Genesee County			
Batavia Nursing Home............	31.43 32.58	956.00	A,B
St. Luke's Manor............	27.21 28.47	828.00	
Niagara County			
Briody Nursing Home............	30.57 31.97	930.00	A,B,C
Deveaux Manor Nursing Home............	30.00 30.80	913.00	A,B,D
Fairchild Manor Nursing Home............	27.84 29.32	847.00	A,B,C,D
Hilltop Nursing Home............	29.29 x	891.00	A

A	Prescription Drugs
B	Physical Therapy
	Occupational Therapy
D	Speech Therapy
E	Physician Services
F	Dental Services
G	All Inclusive

NURSING HOMES

1775

Schedule of Rates

Region: WESTERN NEW YORK REGION

Period: 1/1/76 - 12/31/76

County Name of Facility	Daily Rate	Monthly Rate	Services Included
Niagara County (cont'd.)			
Newfane Health Facility..........................	$30.74 36.15	$ 935.00	A,B,C,D
Niagara Falls Memorial Nursing Home Co,Inc..	48.11 49.93	1463.00	G
Odd Fellows and Rebekah Nursing Home,Inc....	35.61 37.00	1083.00	
St. Clare's Manor of Lockport...............	27.97 29.28	851.00	B,C,F
St. Mary's Manor..............................	34.63 36.28	1053.00	A,B,C,D
United Church Colony Home....................	30.94 32.28	941.00 4/1/76	A,B,C
St. Mary's Manor-Non-occupant Services).....	11.12 11.67		G
Orleans County			
Orchard Manor Nursing Home..................	30.09 31.21	915.00	
Wyoming County			
East Side Nursing Home........................	31.71 32.98	965.00	A,B,C
M[illegible]r Oak Nursing Home........................	26.74 27.80	813.00	B

A Prescription Drugs
B Physical Therapy
C Occupational Therapy
D Speech Therapy
E Physician Services
F Dental Services
G All Inclusive

1776

NURSING HOMES

Schedule of Rates

Region: ROCHESTER

Period: 1/1/76 - 12/31/76

County Name of Facility	Daily Rate	Monthly Rate	Services Included
Chemung County			
Elcor Nursing Home	$30.52 31.94	$ 928.00	C,E
Livingston County			
Avon Nursing Home	28.82 29.86	877.00	
Conesus Lake Nursing Home	28.29 29.54	860.00	
Monroe County			
Aberdeen Nursing Home	25.61 26.83	779.00	
Alaimo Nursing Home	28.32 29.62	861.00	
Beechwood Sanitarium	35.65 37.10	1084.00	A,B,C,D,F
Blossom Nursing Home	38.97 40.62	1185.00	B,C,F,E
Brightonian Nursing Home	29.36 30.73	893.00	C
Church Home of Protestant Episcopal Church	44.50 46.41	1354.00	B,C,E
Cobbs Hill Nursing Home	38.19 39.60	1162.00	B,D
Crest Manor Nursing Home	37.43 39.04	1138.00	B,C
C[illegible]la Nursing Home	30.68 32.06	933.00	
El[illegible]rest Sanitarium	20.76 "	631.00	
Fairport Baptist Home Infirmary	37.38 38.84	1137.00	A,B,C,E,F
Flower City Nursing Home	25.64 26.87	780.00	
Goodman Gardens Nursing Home	38.13 39.61	1160.00	
Hamilton Manor Nursing Home	18.91 19.78	575.00	
Hill Haven Nursing Home	35.69 37.35	1086.00	F
Hurlbut Nursing Home	29.38 30.64	894.00	
Jewish Home and Infirmary	37.08 38.83	1128.00	A,B,C,D,F
Lakeshore Nursing Home	32.84 33.85	999.00	B
Latta Road Nursing Home	20.98 23.03	638.00	
Latta Road "A" Nursing Home	19.03 19.93	579.00	
Maplewood Sanitarium	25.93 27.18	789.00	B,C
Nortonian Nursing Home	39.81 41.56	1210.00	B,E
Park Ridge Nursing Home	42.80 44.27	1302.00	G
Pavilion Nursing Home	31.90 33.41	970.00	
Penfield Nursing Home	29.24 30.58	889.00	
Rochester Friendly Home	34.30 35.91	1043.00	A,B,C,E,F
St. Ann's Home for the Aged Infirmary Care	36.38 38.08	1107.00	G
St. John's Nursing Home	48.99 50.94	1490.00	G

A Prescription Drugs
B Physical Therapy
C Occupational Therapy
D Speech Therapy
E Physician Services
F Dental Services
G All Inclusive

NURSING HOMES

Schedule of Rates 1777

Region: ROCHESTER

Period: 1/1/76 - 12/31/76

County Name of Facility	Daily Rate	Monthly Rate	Services Included
Monroe County (cont'd.)			
Wedgewood Nursing Home........................	$27.43 28.68	$ 834.00	
Westgate Nursing Home........................	35.65 37.26	1084.00	B,C
Hillside Manor Nursing Home...................	31.95 33.29	972.00	
St. John's Nursing Home Co.-Non-occupant Services	13.15 13.80		G
Ontario County			
Elm Manor Nursing Home........................	28.98 -30.35	881.00	
Geneva General Hospital Nursing Home Co.,Inc.	40.40 41.87	1229.00	G
Thompson Nursing Home........................	38.57 45.32	1173.00	G
Seneca County			
Seneca Nursing Home and HRF...................	30.65 31.85	932.00	B
Steuben County			
Hornell Nursing Home.........................	30.38 30.97	924.00	
Wayne County			
Blossom View Nursing Home....................	32.86 34.26	999.00	
Newark Manor Nursing Home....................	28.63 29.52	871.00	
Yates County			
Penn Yan Nursing Home........................	35.00 36.35	1065.00	A,B,C

A Prescription Drugs
B Physical Therapy
C Occupational Therapy
D Speech Therapy
E Physician Services
F Dental Services
G All Inclusive

NURSING HOMES

Schedule of Rates

Region: Central New York

Period: 1/1/76 - 12/31/76

County Name of Facility	Daily Rate	Monthly Rate	Services Included
Broome County			
Elizabeth Church Manor Infirmary	$25.17 26.35	$ 766.00	
Endicott Nursing Home	31.58 32.93	961.00	A,B
Good Shepherd-Fairview Home,Inc.	28.91 30.21	879.00	A
Rivermede Manor Nursing Home	32.68 34.14	994.00	A,B
Susquehanna Nursing Home and HRF	36.38 36.36	1107.00	B,C,D
Vestal Nursing Home	31.63 33.07	962.00	B,F
Cayuga County			
Auburn Nursing Home	28.31 29.58	861.00	B
Howd Nursing Home	26.23 27.41	798.00	
Maxwell Nursing Home	20.79 21.74	632.00	
Mercy Health & Rehabilitation Center	40.45 38.23	1230.00	G
Chenango County			
Chase Memorial Nursing Home	31.16 32.45	948.00	B,C,D
Valley View Manor Nursing Home	28.14 29.37	856.00	B,C
Cortland County			
Cortland Nursing Home	30.73 32.04	935.00	B,E
Highgate Manor of Cortland	32.79 34.19	998.00	B,C,F
Herkimer County			
Folts Home	25.00 26.23	760.00	B,E
Van Allen Nursing Home	33.62 35.03	1023.00	B,C,F
Mohawk Valley Nursing Home	28.96 44.62	881.00	G
Jefferson County			
Green Briar Nursing Home	30.77 32.03	936.00	A
Samaritan-Keep Nursing Home	37.89 38.24	1152.00	G
Madison County			
Stonehedge-Chittenango Nursing Home and HRF	33.84 35.27	1029.00	

A Prescription Drugs
Physical Therapy
C Occupational Therapy
D Speech Therapy
E Physician Services
F Dental Services
G All Inclusive

Schedule of Rates 1779

Period: 1/1/76 - 12/31/76

on: Central New York

County Name of Facility	Daily Rate	Monthly Rate	Services Included
ida County			
arles T. Sitrin Home	$37.34 38.80	$1136.00	B,E
astern Star Home and Infirmary	30.10 31.42	916.00	A,B,C,E,F
ien Park Nursing Home	33.23 34.54	1011.00	B
nesee Nursing Home	27.34 28.65	832.00	B,C
rding Nursing Home	29.94 31.19	911.00	B,C
rtin Luther Nursing Home	34.36 35.70	1045.00	B,C
sonic Home and Health Facility	33.87 35.54	1030.00	A,B,D,E
Presbyterian Home of Central New York	32.54 35.49	990.00	B,C,D
ome Nursing Home	31.65 33.09	963.00	B,E
St. Joseph's Nursing Home Company of Utica	38.95 40.58	1185.00	A,B,C,D
Stonehedge Nursing Home	29.92 31.23	910.00	B
Sunset Nursing Home	25.11 26.24	764.00	B,C,D,E
arles T. Sitrin Home -Non-occupant Services	9.88 10.37		G
nondaga County			
[illegible]le Rest Nursing Home	34.67 36.32	1055.00	B,D
[illegible] Haven Nursing Home	34.23 35.71	1041.00	B,C
James Square Nursing Home	35.20 36.31	1071.00	B
Jewish Home of Central New York	30.12 34.69	916.00	A,B,D,E
	33.27	1012.00 2/1/76	A,B,D,E
Loretto Geriatric Center	42.30 50.10	1287.00	G
Maple Lawn Nursing Home NOT EL	21.39 22.41	651.00	
Minoa Nursing Home	33.03 34.45	1005.00	A,B,C,D
Plaza Nursing Home	43.42 45.07	1321.00	G
St. Camillus Nursing Home	37.21 38.82	1132.00	A,B,C,D,F
Sunnyside Nursing Home	34.91 36.54	1062.00	A,B,C,F
Loretto Rest, Inc.-Non-occupant Services	11.25 13.92		G
St. Camillus Nursing Home Company, Inc. - Non-occupant Services	10.86 11.40		G
Oswego County			
Harr-Wood Nursing Home	35.29 -36.76	1073.00	B,E
Hillcrest Nursing Home	32.56 33.97	990.00	B,E
Pontiac Nursing Home	29.80 31.48	906.00	D,E
	30.16	917.00 8/1/76	B,D,E

[illegible] Prescription Drugs G All Inclusive
B Physical Therapy
C Occupational Therapy
D Speech Therapy
E Physician Services
F Dental Services

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NURSING HOMES

Schedule of Rates

R on: Central New York

Period: 1/1/76 - 12/31/76

County Name of Facility	Daily Rate	Monthly Rate	Services Included
St. Lawrence County			
Cedars Nursing Home	$29.26 28.78	$ 890.00	
Gouverneur Nursing Home	37.30 37.45	1135.00	G
Highland Nursing Home	25.62 26.76	779.00	B,C,D
Moongate Nursing Home	34.13 35.45	1038.00	B
Potsdam Nursing Home	26.64 26.87	810.00	B,C
St. Joseph's Home	24.73 25.83	752.00	B,C,D
St. Regis Nursing Home	29.54 30.77	899.00	
United Helpers Nursing Home	29,31 30.49	892.00	B,C
Tioga County			
Riverview Manor Nursing Home	24.93 26.06	758.00	D
Tioga Nursing Home	37.43 38.68	1138.00	G
Tompkins County			
Grand Lodge IOOF Home and Orphanage	26.18 28.18	796.00	A
eside Nursing Home	36.33 37.76	1105.00	B,D,F
Oak Hill Manor Nursing Home	29.98 31.10	912.00	C,D,E
Reconstruction Home	29.85 31.20	908.00	A,B,C,D

A Prescription Drugs
B Physical Therapy
C Occupational Therapy
D Speech Therapy
E Physician Services
F Dental Services
G All Inclusive

NURSING HOMES

Schedule of Rates

gion: Northeastern New York

Period: 1/1/76 - 12/31/76

County Name of Facility	Daily Rate	Monthly Rate	Services Included
lbany County			
hild's Nursing Home	$40.98 42.38	$1247.00	G
aughters of Sarah Nursing Home	44.70 46.43	1360.00	A,B,D,E
en Park Nursing Home	33.16 34.59	1009.00	B,C,D
uilderland Center Nursing Home	27.70 28.76	843.00	
ry and Alice Ford Nursing Home	51.15 46.97	1556.00	G
. Margaret's House & Hospital for Babies	34.12 35.75	1038.00	A,B
iversity Heights Nursing Home	45.14 45.03	1373.00	A,B,C,D,F
lla Mary Immaculate	31.03 32.36	944.00	B
inton County			
dar Hedge Nursing Home	24.35 25.48	741.00	
adowbrook Nursing Home	33.88 35.17	1031.00	
cred Heart Home	30.45 30.82	926.00	B
lumbia County			
tist Nursing Home	36.44 37.90	1108.00	A,B,D,E,F
Barnwell Nursing Home	36.76 38.20	1118.00	A,B
Eden Park Nursing Home	30.60 31.95	931.00	
Essex County			
oses Ludington Hospital	49.44 42.39	1504.00	G
ihlein Mercy Center	44.67 46.56	1359.00	A,B,D,E,F
ulton County			
Gloversville Nursing Home	43.30 49.63	1317.00	G
Wells Nursing Home	37.82 39.22	1150.00	G
Greene County			
Eden Park Nursing Home	29.79 31.03	906.00	
Montgomery County			
t. Loretto Convalescent & Rest Home	26.54 27.77	807.00	B
alatine Nursing Home	19.20 20.53	584.00	

escription Drugs
Physical Therapy
Occupational Therapy
Speech Therapy
E Physician Services
F Dental Services
G All Inclusive

NURSING HOMES

Schedule of Rates

egion: Northeastern New York

Period: 1/1/76 - 12/31/76

County Name of Facility	Daily Rate	Monthly Rate	Services Included
tsego County			
neonta Nursing Home	$29.09 30.31	$ 885.00	F
ensselaer County			
den Park Nursing Home	27.26 - 28.83 27.52 -	829.00 837.00 4/1/76	
allmark Nursing Home	30.86 32.29	939.00	B,D
ighgate Manor	36.68 - 38.11	1116.00	B,C,D
oosick Falls Health Center	25.42 26.62	773.00	
esurrection Rest	23.70 24.78	721.00	
aratoga County			
esley Nursing Home	43.21 45.70	1314.00	A,B,D,F
chenectady County			
allmark Nursing Home	33.37 36.08	1015.00	B,C,D
ingsway Arms Nursing Center	35.57 37.11	1082.00	
Silver Haven Nursing Home	32.45 33.87	987.00	
choharie County			
Eden Park Nursing Home	30.50 31.70	928.00	A,B,C
arren County			
Adirondack Tri-County Nursing Home	37.14 38.57	1130.00	B
Eden Park Nursing Home	33.97 35.38	1033.00	B,C,E
Hallmark Nursing Center	31.38 31.53	954.00	
ashington County			
Fort Hudson Nursing Home	29.42 30.51	895.00	B
Indian River Nursing Home	26.71 27.25	812.00	B,D,E

A Prescription Drugs
B Physical Therapy
C Occupational Therapy
D Speech Therapy
E Physician Services
F Dental Services
G All Inclusive

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NURSING HOMES

Schedule of Rates

Region: Northern Metropolitan Period: 1/1/76 - 12/31/76

County Name of Facility	Daily Rate	Monthly Rate	Services Included
Dutchess County			
Central Dutchess Nursing Home	$34.41 35.99	$1047.00	C
Eden Park Nursing Home	41.73 43.46	1269.00	A,B,E
Ferncliff Nursing Home	44.03 45.75	1339.00	G
Hyde Park Nursing Home	44.08 43.61	1341.00	A,B,E,F
Lovely Hill Nursing Home	36.15 37.69	1100.00	B
Northeastern Conference Nursing Home	38.96 40.59	1185.00	B,D,F
Orange County			
Earle Nursing Home	25.28 -26.44	769.00	
Jones and Martin Nursing Home	22.76 23.79	692.00	E
Montgomery Nursing Home	29.57 30.64	899.00	A,C
St. Teresa's Nursing Home	40.15 41.71	1221.00	B,C,D,E,F
Sylcox Nursing Home	38.79 40.31	1180.00	B
Putnam County			
[illegible]nt Nursing Home	33.69 35.05	1025.00	
Rockland County			
Elmwood Manor Nursing Home	45.30 51.16	1378.00	A,B
	49.17	1496.00 2/13/76	A,B
Hillcrest Nursing Home	39.73-41.38	1208.00	A,B
Maple Leaf Nursing Home	43.40 45.10	1320.00	A,B
Nyack Manor Nursing Home	36.40 41.28	1107.00	A,B
Ramapo Manor Nursing Home	41.37 40.16	1258.00	A,B,C
Riverside Nursing Home	39.21 40.73	1193.00	A,B
Tolstoy Foundation Nursing Home	43.69 45.63	1329.00	A,B,D,F
	44.19	1344.00 9/1/76	A,B,D,E,
Sullivan County			
Roscoe Community Nursing Home	39.24-40.76	1194.00	B,C,D,F
Walnut Mountain Nursing Home	34.23-40.24	1041.00	
	38.69	1177.00 7/1/76	

A Prescription Drugs
B Physical Therapy
C Occupational Therapy
D Speech Therapy
Physician Services
F Dental Services
G All Inclusive

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NURSING HOMES

Schedule of Rates

R[illegible]on: Nortern Metropolitan

Period: 1/1/76 - 12/31/76

County Name of Facility	Daily Rate	Monthly Rate	Services Included
Ulster County			
Hadler's Nursing Home	$23.32-24.38	$ 709.00	
Hudson Valley Nursing Home	31.40-32.60	955.00	B
Hutton Nursing Home	32.62-33.88	992.00	B,C
New Paltz Nursing Home	32.81-34.25	998.00	
Westchester County			
Asthmatic Children's Foundation	28.50-29.63	867.00	E
Bayberry Nursing Home	30.44-31.76	926.00	
Bethel Nursing Home	49.09-50.90	1493.00	A
Brandywine Nursing Home	58.94-60.27	1793.00	A
Briar Crest Nursing Home	29.67-30.97	902.00	
Cedar Manor Nursing Home	41.41-42.34	1260.00	
Centre Manor Nursing Home	32.95-34.37	1002.00	
Cortlandt Health Care Center	41.75-42.66	1270.00	A
Dumont Nursing Home	42.48-44.24	1292.00	
Home for Aged Blind	38.66-40.32	1176.00	A,B,E,F
Howe Avenue Nursing Home	55.60-55.09	1691.00	G
[illegible]son View Nursing Home	52.65-54.16	1601.00	A
	52.06	1583.00 2/1/76	
King Street Home, Inc	45.42-47.13	1382.00	
Marrs Nursing Home	38.48-39.95	1170.00	B,C
New Rochelle Nursing Home	42.11-43.84	1281.00	B,F
Nursing Home and Extended Care Facility of White Plains	37.48 39.03	1140.00	B,C,E
Port Chester Nursing Home	39.54-41.09	1203.00	
St. Cabrini Nursing Home	55.00-57.29	1673.00	G
Sans Souci Nursing Home	45.09-44.32	1371.00	A,B
	44.39 -	1350.00 3/1/76	B
Sarah R. Neuman Nursing Home	44.59-46.42	1356.00	B,C,E
Sawmill River Nursing Home CLOSED	38.07-	1158.00	B
Shalom Nursing Home	47.24-48.95	1437.00	A,B
Sky View Haven Nursing Home	46.50 49.08	1414.00	B
	47.31	1439.00 8/1/76	B
Somers Manor Nursing Home	40.78 42.54	1240.00	B
Sprain Brook Manor Nursing Home	45.15 46.93	1373.00	

A	Prescription Drugs
B	Physical Therapy
C	Occupational Therapy
D	Speech Therapy
E	Physician Services
[illegible]	Dental Services
G	All Inclusive

Schedule of Rates

ion: Northern Metropolitan

Period: 1/1/76 - 12/31/76

County Name of Facility	Daily Rate	Monthly Rate	Services Included
Westchester County (cont'd.)			
Tarrytown Hall Nursing Home..................	$42.06 - 43.58	$1279.00	A,B,C
Tibbetts Health Care Facility................	43.47 - 44.98	1322.00	
United Home for Aged Hebrews.................	43.58 - 45.48	1326.00	A,B,C,E,F
United Nursing Home for Aged, Inc............	50.26 - 51.96	1529.00 1/28/76	G
Wartburg Nursing Home........................	39.15 - 40.81	1191.00	A,B,E,F
Waterview Hills Nursing Home.................	42.09 - 42.67	1280.00	B,C,D
Westledge Nursing Home.......................	44.09 - 46.48	1341.00	B
White Plains Center for Nursing Care.........	37.35 - 38.96	1136.00	B,C
Woodland Nursing Home........................	45.01 - 46.76	1369.00	C

A	Prescription Drugs
B	Physical Therapy
C	Occupational Therapy
D	Speech Therapy
E	Physician Services
F	Dental Services
G	All Inclusive

NURSING HOMES

Schedule of Rates

ISLAND

Period: 1/1/76 - 12/31/76

County Name of Facility	Daily Rate	Monthly Rate	Services Included
Nassau County			
Bayview Nursing Home	$42.75 44.43	$ 1,300.00	B
Belair Nursing Home	38.00 39.60	1,156.00	
Central Island Nursing Home	39.52 41.17	1,202.00	C
Community Drive Nursing Home new name-wedgewd	37.15	1,130.00	
Daleview Nursing Home	42.89 - 44.63	1,305.00	B
East Rockaway Nursing Home	46.66 48.39	1,419.00	B
Five Towns Nursing Home	38.39 39.29	1,168.00	A,B,E
Franklin Park Nursing Home	41.23 42.99	1,254.00	B
Glengariff Nursing Home	41.47 43.20	1,261.00	B
Grace Plaza of Great Neck	40.50 42.17	1,232.00	
Long Beach Grandell	40.14 41.75	1,221.00	B
Long Beach Memorial Nursing Home, Inc	47.95 62.48	1,458.00	G
Long Island Tides Nursing Home	42.42 44.19	1,290.00	B
Mayfair Nursing Home	43.52 45.28	1,324.00	A,B
Montclair Nursing Home	41.54 - 43.25	1,264.00	
Nassau Nursing Home	35.00 36.52	1,065.00	B
Park View Nursing Home	39.69 41.47	1,207.00	C
	39.86	1,212.00 7/1/76	C
Park Villa Nursing Home clsd	27.52	837.00	
Port Washington Nursing Home	32.02 - 33.37	974.00	
Rockville Nursing Center	40.04 41.72	1,218.00	B
Sands Point Nursing Home	35.72 37.21	1,086.00	C
South Shore Nursing Home	43.06 44.84	1,310.00	
Sun Harbor Manor Nursing Home	43.91 45.61	1,336.00	B
United Presbyterian Home at Syosset	41.23 42.98	1,254.00	A,B,C
Wishing Well Nursing Home clsd.	30.13	916.00	
Woodbury Nursing Home	42.36 44.11	1,288.00	
Wedgewood Nursing Home (Formerly Community Drive Nursing Home)	40.07 42.97	1,219.00- 5/14/76	
	41.22	1,254.00- 8/1/76	
Suffolk County			
Berkshire Nursing Home	39.55 40.20	1,203.00	
Birchwood Nursing Home	48.69 50.55	1,481.00	B,C
Carillon House Nursing Home	40.53 42.24	1,233.00	
Cedar Lodge Nursing Home	33.19 34.38	1,010.00	
Consolation Nursing Home	50.54 52.42	1,537.00	A,B,C,D
Eastern Suffolk Nursing Home	35.93 37.38	1,093.00	E

A- Prescription Drugs
B- Physical Therapy
C- Occupational Therapy
D- Speech Therapy
E- Physician Services
F- Dental Services
G- All Inclusive

NURSING HOMES

Schedule of Rates

Region: LONG ISLAND Period: 1/1/76 - 12/31/76

County Name of Facility	Daily Rate	Monthly Rate	Services Included
Suffolk County (Continued)			
Hilaire Farm Nursing Home	$38.52 40.22	$1,172.00	
Huntington Nursing Home CLSD	34.57	1,052.00	B,C
Little Flower Nursing Home and H.R.F	41.13 -42.74	1,251.00	B
Oak Hollow Nursing Center	46.07 47.85	1,401.00	A,B,C
Patchogue Nursing Center	38.90 40.38	1,183.00	B,C
Port Jefferson Nursing Home	43.83 44.96	1,333.00	B
Riverhead Nursing Home	40.89 42.51	1,244.00	
Ross Nursing Home	40.11 41.71	1,220.00	B
St. James Nursing Home	44.88 46.71	1,365.00	A,B,C,D
St. Johnland Nursing Home, Inc.	48.82 50.60	1,485.00	G
Sayville Nursing Home	44.72 46.55	1,360.00	B,C,D,F
Smithtown Nursing Home	36.31 37.83	1,104.00	B,C,D
Sunrest Nursing Home	37.05 38.57	1,127.00	B,E
Sunrise Manor Nursing Home	46.64 43.73	1,419.00	B,D
Todd Nursing Home	42.54 44.26	1,294.00	B,C
Westhampton Nursing Home	32.92 34.30	1,001.00	
Woodhaven Manor Nursing Home and HRF	45.10 46.88	1,372.00	B
Non-Occupation Services (Subchapter H)			
Long Beach Memorial Nursing Home, Inc. (Nassau County)	17.03 no rate		G

A- Prescription Drugs
B- Physical Therapy
C- Occupational Therapy
D- Speech Therapy
E- Physician Services
F- Dental Services
G- All Inclusive

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NURSING HOMES

Schedule of Rates

Period: 1/1/76 - 12/31/76

Region: NEW YORK CITY REGION

County Name of Facility	Daily Rate	Monthly Rate	Services Included
Bronx County			
Astor Gardens Nursing Home	$36.61-37.68	$1114.00	B
Bainbridge Nursing Home	42.77 44.66	1301.00	A,B
	42.88	1304.00 6/1/76	A,B
Beth Abraham Hospital	59.47 61.93	1809.00	A,B,C,D,E
Bruckner Nursing Home	43.36 45.30	1319.00	A,B,C,D
	43.56	1325.00 2/1/76	A,B,C,D
Concourse Nursing Home	52.85 54.24	1608.00	G
	52.55	1598.00 3/1/76	G
	52.80	1606.00 9/1/76	G
Co-Op Care Center	49.91 65.82	1518.00	A,B,D
Daughters of Jacob Nursing Home	65.82 68.14	2002.00	G
Eastchester Park Nursing Home	39.20 40.87	1192.00	A,B,C
Fairfield Nursing Home	43.55 45.40	1325.00	
Fieldston Lodge Nursing Home	44.02 45.73	1339.00	
	44.12	1342.00 5/1/76	B
Frances Schervier Home and Hospital	43.54 45.30	1324.00	A,B,C,D,E
Hebrew Home for the Aged	48.72 50.71	1482.00	A,B,C,E
Hebrew Hospital for Chronic Sick	44.77 46.63	1362.00	G
House of Holy Comforter	42.59 44.40	1295.00	A,B,C,E
Kings Harbor Care Center	51.05 53.22	1553.00	A,B,C
Kings Harbor Manor Nursing Home	43.41 45.16	1320.00	A,B,C,D
Kings Terrace Nursing Home	46.34 48.09	1410.00	B
Kingsbridge Heights Nursing Home	50.66 51.73	1541.00	A,B,C
Laconia Nursing Home	45.17 47.16	1374.00	A,B,C
	45.31	1378.00 2/1/76	A,B,C
Methodist Church Home for the Aged	40.20 41.96	1223.00	A,B,E
Morningside House Nursing Home	56.20 58.28	1709.00	A,B,C,E,F
Morris Park Nursing Home	45.54 47.52	1385.00	B,E,
	45.68	1389.00 2/1/76	B,E
Mosholu Parkway Nursing Home	42.72 44.51	1299.00	
Notre Dame Home for the Aged Poor	29.74 31.04	905.00	A,B,C
Palisade Nursing Home	62.12 64.27	1889.00	A,B,C,E
Parkview Nursing Home	44.16 46.01	1343.00	A,B,C
Pelham Parkway Nursing Home	44.50 46.29	1354.00	A,B,C,D
Providence Rest Home for the Aged	43.98 46.10	1338.00	A,B,C,E,F
	44.27	1347.00 3/1/76	A,B,C,E,F
Rest Haven Nursing Home CLSD	34.88	1061.00	
Riverdale Nursing Home	40.58 45.46	1234.00	B
	43.61	1326.00 4/1/76	B
Rofay Nursing Home	44.30 46.15	1347.00	B

Prescription Drugs
B Physical Therapy
C Occupational Therapy
D Speech Therapy
E Physician Services
F Dental Services
G All Inclusive

NURSING HOMES

Schedule of Rates

Region: NEW YORK CITY REGION

Period: 1/1/76 - 12/31/76

County Name of Facility	Daily Rate	Monthly Rate	Services Included
Bronx County (cont'd.)			
St. Patrick's Home for Aged and Infirm	$41.69 43.38	$1268.00	A,B,C,F
Split Rock Nursing Home	39.59 41.19	1204.00	A,B
United Odd Fellows and Rebekah Home	40.11 41.75	1220.00	A,B,E,F,
University Nursing Home	36.65 38.21	1115.00	B,C
W.K. Nursing Home	68.77 71.34	2092.00	G
Wayne Health Related Facility	48.05 49.91	1462.00	G
West Road Nursing Home	66.52 70.90	2023.00	G
White Plains Nursing Home	39.69 41.51	1207.00	A,B
Williamsbridge Manor Nursing Home	41.42 43.22	1260.00	B,C
Workmen's Circle Home and Infirmary	43.69 45.52	1329.00	A,B,C,E,F
W.K. Nursing Home-Non-Occupant Services	20.02 20.88		G
Kings County			
Augustana Lutheran Home for Aged	35.69 37.25	1086.00	A,B,F
Baptist Home of Brooklyn	41.67 39.66	1267.00	A,C,E,F
	41.74	1270.00 7/1/76	A,C,E,F
Belt Parkway Nursing Home	33.50 39.66	1019.00	B
	37.48	1140.00 6/1/76	B
Brookdale Hospital Center Nursing Home	61.96 62.28	1885.00	G
Brooklyn Methodist Church Home	33.70 35.18	1025.00	A,B,E,F
Carlton Nursing home	36.80 39.09	1119.00	B
	36.93	1123.00 2/1/76	B
	36.36	1106.00 4/1/76	B
Caton Park Nursing Home	46.64 48.38	1419.00	B
	46.83	1424.00 4/1/76	B
Cobble Hill Nursing Home	39.37 41.64	1197.00 5/17/76	A,B,C
Concord Nursing Home	48.48 49.91	1475.00	G
Congress Nursing Home CLSD - COBBLE HILL	32.11	977.00	B
Coronet Nursing Home CLSD	32.97	1003.00	
	37.14	1130.00 7/1/76	
Crown Nursing Home	38.49 40.79	1171.00	
	38.95	1185.00 2/1/76	

A	Prescription Drugs
B	Physical Therapy
C	Occupational Therapy
D	Speech Therapy
E	Physician Services
F	Dental Services
G	All Inclusive

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NURSING HOMES

Schedule of Rates

gion: NEW YORK CITY REGION

Period: 1/1/76 - 12/31/76

County Name of Facility	Daily Rate	Monthly Rate	Services Included
ngs County (cont'd.)			
ver Nursing Home	$38.80 37.95	$1180.00	
	39.02	1187.00 3/1/76	
	36.66	1115.00 4/1/76	
rragut Nursing Home	35.31 36.86	1074.00	B
reen Park Care Center	51.14 53.16	1556.00	B
aym Salomon Home for the Aged	40.46 42.17	1231.00	G
oly Family Home, 1601 8th Avenue	33.09 34.54	1006.00	A,B,C,E
oly Family Home, 1740 84th Street	50.61 50.51	1539.00	A,B,C,E
ngersoll Nursing Home	33.31 40.17	1013.00	
	36.67	1115.00 4/1/7	
	33.50	1171.00 8/1/76	
emberg Home and Geriatric Institute	40.77 -42.48	1240.00	A,B,C,E,F
indenboro Nursing Home	48.07 50.01	1462.00	A,B,C
adonna Residence	38.75 39.70	1179.00	A,B,C,E,F
enorah Home and Hospital for Aged & Infirm.	52.57-54.80	1599.00	A,B,C,D,E
.J.G. Nursing Home	69.51 - 71.05	2114.00	G
ew rk Congregational Home	36.86 - 38.01	1121.00	A,C,E,F
orwegian Christian Home and Health Center	45.79 - 45.87	1393.00	G
xford Nursing Home	35.80 -37.54	1089.00	B
	35.93	1093.00 2/1/76	B
Palm Gardens Nursing Home	47.51 49.51	1445.00	B,C,D
Palm Tree Nursing Home	40.97 42.97	1246.00	B,C,D
	41.19	1253.00 3/1/76	B,C,D
Park Lane Nursing Home	29.67	902.00	
Prospect Park Nursing Home	38.02 39.61	1156.00 2/1/76	
Sea Crest Health Care Center	40.61 42.19	1235.00	A,B
Sephardic Home for Aged	47.51 50.59	1445.00	A,B,C,E,F
Sheepshead Nursing Home	46.94 49.58	1428.00	B
	47.05	1431.00 2/1/76	B
	47.75	1452.00 5/1/76	A,B
Shore View Nursing Home	40.44 42.15	1230.00	A,B
Wartburg Nursing Home	52.47-54.32	1596.00	A,B,E,F
Willoughby Nursing Home	39.94 41.87	1215.00	B
	40.13	1221.00 2/1/76	B
Rutland Nursing Home	84.35 88.35	2566.00 7/22/76	G

A Prescription Drugs
B Physical Therapy
C ccupational Therapy
D Speech Therapy
E Physician Services
F Dental Services
G All Inclusive

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NURSING HOMES

Schedule of Rates

Region: NEW YORK CITY REGION

Period: 1/1/76 - 12/31/76

County Name of Facility	Daily Rate	Monthly Rate	Service Includ
New York County			
American Nursing Home	$44.49 - 46.10	$1353.00	B,C
	44.33	1348.00 9/1/76	B,C
Bialystoker Home for the Aged	49.65 43.14	1510.00	A,B,C,E
DeWitt Nursing Home	51.82 54.26	1576.00	A,B,C
	52.07	1584.00 8/1/76	A,B,C
Florence Nightingale Nursing Home	50.43 52.64	1534.00	A,B,D
Fort Tryon Nursing Home	45.54 47.95	1385.00	A,B,C
	46.02	1400.00 2/1/76	A,B,C
Gramercy Park Nursing Home CLOSED	32.66	993.00	
Greater Harlem Nursing Home Company, Inc.	52.82 54.64	1607.00 2/5/76	G
Home of the Sages of Israel	37.93 39.56	1154.00	A,B,E
Isabella Home Nursing Home	68.67 71.15	2089.00	G
Jewish Home and Hospital for the Aged	62.00 64.55	1886.00	A,B,C,E
Mary Manning Walsh Nursing Home	53.48 -55.42	1627.00	A,B,C,E,
Mt. Carmel Nursing Home for the Aged	35.67- 37.06	1085.00	A,B,C,E
Park Crescent Nursing Home	46.57 43.14	1417.00	B,C,D
	43.14	1312.00 4/1/76	B,C,D
Riverview Nursing Home CLOSED	31.35	954.00	
Sangers Nursing Home	33.90 35.41	1031.00	
Village Nursing Home	36.70 38.34	1116.00	
Queens County			
Bayside Gardens Nursing Home	37.44 39.07	1139.00	B
Bridgeview Nursing Home	40.80 42.33	1241.00	B,C
Brookhaven Beach Nursing Home 17-11 Brookhaven Avenue	44.72 46.77	1360.00	A,B
	44.97	1368.00 6/1/76	A,B
Brookhaven Beach Health Related Facility 250 Beach 17th Street	37.13 38.82	1129.00	A,B
	37.35	1136.00 6/1/76	A,B
Clearview Nursing Home	38.69 40.48	1177.00	
	38.81	1180.00 3/1/76	
Cliffside Nursing Home	44.45 46.15	1352.00	A,B
College Nursing Home	44.26 46.17	1346.00	B
Dry Harbor Nursing Home	46.10 48.03	1402.00	A,B,C,D
	46.16	1404.00 2/1/76	A,B,C,D
Fairview Nursing Home	44.68 46.59	1359.00	B
	44.96	1368.00 6/1/76	B

A Prescription Drugs
B Physical Therapy
C Occupational Therapy
D Speech Therapy
E Physician Services

NURSING HOMES

Schedule of Rates

gion: NEW YORK CITY REGION Period: 1/1/76 - 12/31/76

County Name of Facility	Daily Rate	Monthly Rate	Servic Includ
Queens County (cont'd.)			
Far Rockaway Nursing Home	$41.07 - 42.82	$1249.00	B
	41.25	1255.00 2/1/76	B
Flushing Manor Care Center	46.88 - 48.69	1426.00	B,C,D
Flushing Manor Nursing Home	40.61 - 44.49	1235.00	B,C
Forest Hills Nursing Home	41.19 - 43.02	1253.00	B,C
Forest View Nursing Home	44.00 - 45.84	1338.00	A,B,C
Franklin Nursing Home	48.40 - 50.37	1472.00	A,B,C,D
Hillside Manor	49.19 51.47	1496.00	B,C,D
	49.53	1507.00 4/1/76	B,C,D
Hollis Park Gardens Nursing Home	46.00 47.09	1399.00	B
Holliswood Care Center	45.21 47.05	1375.00	A,B,D
	45.51	1384.00 5/1/76	A,B,D
Jamaica Hospital Nursing Home	60.64 63.62	1844.00	G
Jewish Institute for Geriatric Care	71.13 73.28	2164.00	G
Lawrence Nursing Home	50.16 52.16	1526.00	B,C,E
Little Neck Nursing Home	50.86 49.09	1547.00	
Long Island Nursing Home	38.18 39.89	1161.00	B,D
	38.37	1167.00 3/1/76	B,D
den Nursing Home	45.17 47.32	1374.00	B
Margaret Tietz Center for Nursing Care	51.38 53.20	1563.00	G
Meadow Park Nursing Home	41.69 - 41.35	1268.00	B
	39.58	1204.00 4/1/76	B
Midway Nursing Home	44.76 46.48	1361.00	A,B,C,D
New Glen Oaks Nursing Home	48.90 47.58	1487.00	
	48.76	1483.00 9/1/76	
Oceanview Nursing Home	35.58 40.04	1082.00	
	38.35	1166.00 2/1/76	
	38.43	1169.00 7/1/76	
Ozanam Hall of Queens Nursing Home	58.86 61.00	1790.00	A,B,C,E,
Park Nursing Home	42.65 44.53	1297.00	B
Peninsula General Nursing Home	67.32 72.73	2063.00	G
Promenade Nursing Home	41.07 - 42.50	1249.00	B,D

A. Prescription Drugs
B Physical Therapy
C Occupational Therapy
D Speech Therapy
E Physician Services
F Dental Services
G All Inclusive

NURSING HOMES

SCHEDULE OF RATES

REGION: NEW YORK CITY REGION

COUNT[illegible] QUEENS (cont'd)

Queen of Peace	$ 41.17
Qeens-Nassau	46.08
Rego Park	50.11
Resort Nursing Home	49.84
ST. MARY'S HOSPITAL FOR CHILDREN	61.94
Surfside	42.52
Van Doren	46.17
Windsor Park	45.48
Woodcrest	44.81
Woodhull	45.12

COUNTY: RICHMOND

Carmel Richmond	52.58
Clare Lakes	44.16
Eger	65.40
Golden Gate	43.79
Lilly Pond	36.71
New Brighton	44.75
New Vanderbilt	44.62
Silver Lake	43.01
Verrazzano	40.50

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HEALTH RELATED FACILITIES

Schedule of Rates

Region: WESTERN NEW YORK

Period: 1/1/76 - 12/31/76

County Name of Facility	Daily Rate	Monthly Rate		Services Included
Cattaraugus County				
Salamanca Nursing Home	$23.49 24.31	$ 714.00		
Chautauqua County				
Gerry Nursing Home Company	23.30 24.11	709.00		A,B.D
Lutheran Retirement Home	20.51 21.36	624.00		
Presbyterian Homes of Western New York	23.86 24.75	726.00		
Erie County				
Aurora Park Nursing Home	21.37 23.40	650.00		B,C
	22.56	686.00	6/7/76	B,C
Brothers of Mercy Nursing Home	26.47-27.41	805.00		A,B,C,D
Jennie B. Richmond Chaffee Nursing Home	32.62-31.41	992.00		G
Manhattan Manor Nursing Home	21.42-22.28	652.00		
Nazareth Health Related Facility	22.47-23.52	683.00		A, B, C,D
agara Frontier Methodist Home	13.72 14.32	417.00		B,C
Orchard Park Health Related Facility	22.13-22.95	673.00		C
Presbyterian Homes of Western New York	18.99-19.91	578.00		
Rosa Coplon Jewish Home and Infirmary	20.15-20.95	613.00		A,B,C,F
St. Francis Home of Williamsville	13.60-14.25	414.00		A
Seneca Manor Health Related Facility	22.21-2303	676.00		
Tri-Del Nursing Center	27.76-28.88	844.00		B,C,D
Wheel Chair Home	20.04-20.96	610.00		
Williamsville View Manor	22.49-23.34	684.00		B,C,D,E
24 Rhode Island Street Nursing Home	27.27-28.20	829.00		
Niagara County				
Newfane Health Related Facility	19.73-22.03	600.00		A,B,C,D
Odd Fellows and Rebekah Nursing Home	26.73-27.70	813.00		
Niagara Geriatric Center	22.82-23.70	694.00	1/13/76	
Orleans County				
Orchard Manor Nursing Home and H.R.F.	19.89-20.65	605.00		

A- Prescription Drugs
B- Physical Therapy
C- Occupational Therapy
D- Speech Therapy
E- Physician Services
F- Dental Services
G- All Inclusive

HEALTH RELATED FACILITIES

Schedule of Rates

Region: ROCHESTER

Period: 1/1/76 - 12/31/76

County Name of Facility	Daily Rate	Monthly Rate	Services Included
Monroe County			
Church Home of Protestant Episcopal Church...	$13.15 -1397	$ 400.00	B,C,E
	13.97	425.00 4/1/76	B,C,E
Fairport Baptist Home..................	19.43 -20.23	591.00	A,B,C,E,F
Goodman Gardens Nursing Home............	24.08 -24.91	732.00	
Hill Haven Health Related Facility..........	22.73 -23.66	691.00	F
Jewish Home and Infirmary.................	22.09 23.15	672.00	A,B,C,D,F
Rochester Friendly Home..................	23.28 24.35	708.00	A,B,C,E,F
St. Ann's Nursing Home (The Heritage)........	21.84 - 22.60	664.00	G
St. John's Home for the Aging...............	21.10 -22.17	642.00	A,B,C,F
St. John's Nursing Home...................	31.14 ·32.31	947.00	G
Rochester Methodist Home..................	13.05 - 13.65	397.00	
Ontario County			
Thompson Nursing Home.....................	27.70 --25.15	843.00 8/9/76	G
Geneva General Hospital Nursing Home.........	28.58-29.50	869.00	G
Seneca County			
Seneca Nursing Home and H.R.F.............	23.90 24.79	727.00	B
Steuben County			
Hornell Nursing Home and H.R.F.............	23.54 -24.37	716.00	

A- Prescription Drugs
B- Physical Therapy
C- Occupational Therapy
D- Speech Therapy
E- Physician Services
F- Dental Services
C- All Inclusive

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HEALTH RELATED FACILITIES

Schedule of Rates

Period: 1/1/76 - 12/31/76

Re[illegible]I: CENTRAL NEW YORK

County Name of Facility	Daily Rate	Monthly Rate	Services Included
Broome County			
Elizabeth Church Manor Infirmary	$11.09 - 11.55	$ 337.00	
Endicott Nursing Home	26.58 - 27.71	808.00	A,B
Good Shepherd-Fairview Home	16.71 - 17.42	508.00	A
Rivermede Manor Nursing Home	25.57 - 26.66	778.00	A,B
Susquehanna Nursing Home and H.R.F	21.99 - 22.54	669.00	B,C,D
Cayuga County			
Mercy Health & Rehabilitation Center	29.77 - 28.83	906.00	G
Chenango County			
Chase Memorial Nursing Home	22.81 23.72	694.00	B,C,D
Cortland County			
Highgate Manor of Cortland	21.94 22.81	667.00	B,C,F
Herkimer County			
Van Allen Nursing Home and H.R.F	26.91 27.97	819.00	B,C,F
Jefferson County			
Samaritan-Keep Nursing Home	29.50 28.00	897.00	G
Madison County			
Stonehedge-Chittenango Nursing Home & H.R.F	24.75 25.75	753.00	

A- Prescription Drugs
B- Physical Therapy
C- Occupational Therapy
D- Speech Therapy
E- Physician Services
F- Dental Services
G- All Inclusive

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HEALTH RELATED FACILITIES

Schedule of Rates

Re[illegible]: CENTRAL NEW YORK

Period: 1/1/76 - 12/31/76

County Name of Facility	Daily Rate	Monthly Rate	Services Included
Oneida County			
Betsy Ross Lodge H.R.F	$24.41 -25.34	$ 742.00	
Charles T. Sitrin Nursing Home	27.25 -28.26	829.00	B,E
Eastern Star Home and Infirmary	22.39 -23 47	681.00	A,B,C,E,F
Eden Park Nursing Home	20.42 21.24	621.00	B
Harding Nursing Home and H.R.F	22.93 23.84	697.00	B,C
H.R.F. of Rome (Bethany House)	24.48 -25.44	745.00	B
Martin Luther Nursing Home	24.79 -25.71	754.00	B,C
Masonic Home and Health Facility	16.60 -17.44	505.00	A,B,D,E
Onondaga County			
Loretto Geriatric Center	27.14 - 32.73	826.00	G
Syracuse Home Association	20.00 - 21.00	608.00	A
Oswego County			
Hillcrest Nursing Home	21.34 -22.19	649.00	B,E
St. Luke's Nursing Home	24.21 -25.11	736.00	A
St. Lawrence County			
Moongate Nursing Home and H.R.F	24.72 -25.61	752.00	B
St. Regis Nursing Home	20.28 21.68	617.00	
United Helpers Nursing Home	21.18 22.83	644.00	B,C
Tompkins County			
Grand Lodge IOOF and Orphanage of NY	17.10 17.87	520.00	A
Lakeside Nursing Home	25.57 26.35	778.00	B,D,F

A- Prescription Drugs
B- Physical Therapy
C- Occupational Therapy
D- Speech Therapy
E- Physician Services
F- Dental Services
G- All Inclusive

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HEALTH RELATED FACILITIES

Schedule of Rates

Period: 1/1/76 - 12/31/76

Re[illegible]n: NORTHEASTERN NEW YORK

County Name of Facility	Daily Rate	Monthly Rate	Services Included
Albany County			
Good Samaritan Nursing Home	$25.72 - 26.68	$ 782.00	A
Teresian House Nursing Home	27.61 31.24	840.00	A,B,D
	30.13	916.00 6/1/76	A,B,D
Clinton County			
Meadowbrook Nursing Home	25.45 -26.35	774.00	
Columbia County			
Adventist Nursing Home	25.83 -26.81	786.00	A,B,D,E,F
Barnwell Nursing Home	21.67 22.58	659.00	A,B
Greene County			
Eden Park Nursing Home	25.61 26.46	779.00	
Rensselaer County			
[illegible]ighgate Manor	25.80 -26.70	785.00	B,C,D
Leisure Arms	18.88 -19.71	574.00	
Resurrection Rest	18.80 -19.65	572.00	
Rosewood Gardens H.R.F.	27.14 28.14	826.00	
Saratoga County			
Wesley Nursing Home	33.15 34.41	1008.00	A,B,D,F
Schenectady County			
Kings Way Arms Nursing Center	23.46 24.40	714.00	
Schoharie County			
Eden Park Nursing Home	22.73 23.38	691.00	A,B,C
Warren County			
Eden Park Nursing Home	23.72 24.66	721.00	B,C,E
Washington County			
Indian River H.R.F.	17.00 17.59	517.00	B,D,E
FORT HUDSON	21.68		

A- Prescription Drugs
B- Physical Therapy
C- Occupational Therapy
D- Speech Therapy
E- Physician Services
F- Dental Services
G- All Inclusive

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HEALTH RELATED FACILITIES

Schedule of Rates

Period: 1/1/76 - 12/31/76

NORTHERN METROPOLITAN

County Name of Facility	Daily Rate	Monthly Rate	Services Included
Dutchess County			
Eden Park Nursing Home	$27.94 -28.96	$ 850.00	A,B,E
Ferncliff Nursing Home	33.12 -34.33	1007.00	G
Fishkill Health Related Center	23.82 24.88	725.00	
	23.96	729.00 5/1/76	B
Lovely Hill Nursing Home	25.46 -26.46	774.00	B
Orange County			
Sylcox Nursing Home	27.26 -28.25	829.00	B
Rockland County			
Friedwald House	29.23 -30.31	889.00	A,B
Ramapo Manor Health Related Facility	28.40 28.58	864.00	A,B,C
Sullivan County			
Walnut Mountain Health Related Facility	23.27 -24.09	708.00	
Ulster County			
Hudson Valley Nursing Center	23.47 24.31	714.00	B
Westchester County			
Bethel Methodist Home	18.63 -19.41	567.00	
Cortlandt Health Care Center	31.20 - 31.30	949.00	A
	30.19	918.00 4/1/76	A
Home of the Aged Blind	25.17-26.26	766.00	A,B,E,F
King Street Health Related Facility	33.33 -34.47	1014.00	
Providence Rest	25.68 -27.01	781.00	A, B,C,E,F
Sarah R. Neuman Nursing Home HRF	36.31- 37.55	1104.00	B,D
Seabury Memorial Home	17.33 -N/C	527.00	A
SkyView Haven Health Related Facility	32.36 33.03	984.00	B
	31.94	972.00 8/1/76	B
Somers Manor Nursing Home and H.R.F.	28.06 -28.01	853.00	C
Swiss Home for the Aged	25.46 -26.55	774.00	
Tarrytown Hall Health Related Facility	30.69- 31.80	935.00	A,B,C
Tibbets Health Care Facility	30.02 -30.98	913.00	
United Home for Aged Hebrews	21.55 22.50	655.00	A,B,C,E,F
Victoria Home for Aged British Men & Women	17.08 -17.82	520.00	
Wartburg Intermediate Care Facility	23.22 -24.32	706.00	A,B,E,F

A- Prescription Drugs
B- Physical Therapy
C- Occupational Therapy
D- Speech Therapy
E- Physician Services
F- Dental Services
G- All Inclusive

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HEALTH RELATED FACILITIES

Schedule of Rates

Region: LONG ISLAND

Period: 1/1/76 - 12/31/76

County Name of Facility	Daily Rate	Monthly Rate	Services Included
Nassau County			
Daleview Manor	$27.23-28.37	$ 828.00	
Five Towns Nursing Home H.R.F.	22.97-23 88	699.00	A
Five Towns H.R.F. - Cerebral Palsy Unit	39.64-40.42	1206.00	A
Forest Manor	23.91 -24.82	727.00	
Glengariff Nursing Home	28.37-29.49	863.00	B
Grace Plaza of Great Neck	26.37 -27.37	802.00	
Long Beach Grandell	27.81-28.84	846.00	B
Long Beach Memorial Nursing Home	28.46 40.26	866.00	G
United Presbyterian Home at Syosset	23.79 24.73	724.00	A,B,C
Rockville Residence Manor	30.18 31.30	918.00	
Sun Harbor Health Related Facility	30.51 31.58	928.00	B
Woodbury East Health Related Facility	25.58 26.54	778.00	
Suffolk County			
Birchwood Nursing Home	33.53 36.35	1020.00	
	35.08	1067.00 6/1/76	
Carillon House Health Related Facility	35.00-34.64	1065.00	
Consolation Nursing Home	32.51 33.61	989.00	A,B,C,D
Crest Hall Health Related Facility	29.77 30.68	906.00	A,B,C,F
Little Flower Nursing Home and H.R.F.	32.03 33.19	974.00	B
Peconic Nursing and Adult Center	24.86 25.72	756.00	
Port Jefferson Nursing Home and H.R.F.	32.00 31.64	973.00	B
Riverhead Nursing Home H.R.F.	24.56 25.41	747.00	
St. James Plaza Health Related Facility	29.89 29.66	909.00	
St. Johnland Nursing Home	32.40 33.52	986.00	G
Smithtown Nursing Home	26.28 27 31	799.00	B,C,D
Sunrest Health Related Facility	28.85 32.64	877.00	
	30.90	940.00 7/1/76	
Woodhaven Manor Nursing Home and H.R.F.	31.37 32.51	954.00	B

A- Prescription Drugs
B- Physical Therapy
C- Occupational Therapy
D- Speech Therapy
E- Physician Services
F- Dental Services
G- All Inclusive

HEALTH RELATED FACILITIES

Schedule of Rates

n: New York City Period: 1/1/76 - 12/31/76

County Bronx County Name of Facility	Daily Rate	Monthly Rate	Services Included
Baptist Home for the Aged	$25.51 - 26.66	$ 776.00	A,B,E
Co-Op Care Center	34.98 - 34.13	1064.00	A,B,D
Daughters of Jacob Nursing Home	39.47 - 41.28	1201.00	G
East Haven Health Related Facility	26.48 - 27.37	805.00	A,B,C
Frances Schervier Home and Hospital	26.82 - 27.97	816.00	A,B,C,D,E
Hebrew Home for the Aged	29.24 - 30.47	889.00	A,B,C,E
Kingsbridge Heights Manor	30.17 - 31.26	918.00	A,B,C,E
Kings HarborManor Facility	33.20 - 34.38	1010.00	A,B,C,D
Kings Terrace Nursing Home and H.R.F.	31.79 - 32.87	967.00	B,D
Methodist Church Home	22.37 - 23.38	680.00	A,B,E
Morningside House Nursing Home	46.00 - 47.69	1399.00	A,B,C,E,F
Notre Dame Home for the Aged Poor	13.92 - 14.53	425.00	A,B,C
Palisade Nursing Home Company	39.55 - 40.80	1203.00	A,B,C,E
Providence Rest Home for the Aged	25.68 27.01	781.00	A,B,C,E,F
	25.83	787.00 3/1/76	A,B,C,E,F
St. Patrick's Home for the Aged	25.12 26.18	764.00	A,B,C,F
United Odd Fellows Home	27.71 28.81	843.00	A,B,E,F
Wayne Health Related Facility	34.11 35.30	1038.00	G
West Road Nursing Home	32.54 42.67	990.00	G
rkman's Circle Home and Infirmary	24.00 25.01	730.00	A,B,C,E,F
Kings County			
Augustana Lutheran Home for the Aged	16.26 - 16.99	495.00	A,B,F
Baptist Home of Brooklyn	29.83 - 29.20	907.00	A,C,E,F
	29.89	909.00	A,C,E,F 7/1/
Brooklyn Methodist Church Home	24.28 - 25.37	739.00	A,B,E,F
Concord Nursing Home	35.48 36.38	1079.00	G
Haym Salomon Home for the Aged	25.59 - 26.70	778.00	G
Holy Family Home, 1740 - 84th Street	35.82 34.98	1090.00	A,B,C,E
Lemberg Home and Geriatric Institute	24.60 - 25.65	748.00	A,B,C,E,F
Madonna Residence	23.04 23.64	701.00	A,B,C,E,F
Menorah Home and Hospital for the Aged	24.35 25.41	741.00	A,B,C,D,E
Metropolitan Jewish Geriatric Center	25.43 25.36	773.00	G
New York Congregational Home	25.66 - 25.91	780.00	A,C,E,F
Norwegian Christian Home and Health Center	22.11 - 21.99	673.00	G
Parkshore Manor Health Related Facility	27.75 - 28.73	844.00	
River Manor Health Related Facility	30.12 31.16	916.00	
Sea Crest Health Care Center	33.44 - 34.65	1017.00	A,B
Sephardic Home for the Aged	33.85 35.00	1029.00	A,B,C,E,F

A- Prescription Drugs
B- Physical Therapy
Occupational Therapy
Speech Therapy
E- Physician Services
F- Dental Services
G- All Inclusive

HEALTH RELATED FACILITIES

Schedule of Rates

gion: NEW YORK CITY

Period: 1/1/76 - 12/31/76

County Name of Facility	Daily Rate	Monthly Rate	Services Included
Kings County (con't)			
Wartburg Lutheran Home	$22.17 - 23.13	$ 674.00	A,B,E,F
Holy Family Home, 1601 - 84th Street	14.09 14.71	429.00	A,B,C,E
Greenpark Care Center	34.02 35.23	1035.00	B
New York County			
Bialystoker Home for the Aged	25.13 - 26.17	764.00	AB,C,E
Home of the Sages of Israel	24.35 - 25.38	741.00	A,B,E
Isabella Home Nursing Home Company Inc.	34.87 - 36.07	1061.00	G
Jewish Home and Hospital for the Aged	30.32 - 31.60	922.00	A,B,C,E
Mary Manning Walsh Home	37.73 - 39.05	1148.00	A,B,C,E,F
Mt. Carmel Home for the Aged	22.39 - 23.28	681.00	A,B,C,E
Queens County			
Brookhaven Beach Health Related Facility	28.41 - 29.67	864.00	A,B
	28.65	871.00 6/1/76	A,B
Bezalel Nursing Home Company	30.54 - 31.03	929.00	G
	30.00	913.00 9/1/76	G
Chapin Home for the Aged	31.96 - 33.23	972.00	A,B,E,F
Dry Harbor Nursing Home and H.R.F.	32.46 - 33.73	987.00	A,B,C,D
	32.53	989.00 2/1/76	A,B,C,D
Flushing Manor Care Center	32.85 - 33.98	999.00	B,C,D
Haven Manor Health Related Facility	34.10 35.20	1037.00	A,B,C,D,F
Hillside Manor Health Related Facility	34.00 35.28	1034.00	B,C,D
	34.09	1037.00 4/1/76	B,C,D
Holliswood Health Care Center	31.08 31.94	945.00	A,B,D
	31.10	946.00 5/1/76	A,B,D
Ozanam Hall of Queens Nursing Home	34.48 35.60	1049.00	A,B,C,E,F
Queen of Peace Residence	20.32 21.19	618.00	A,B,C,E
Resort Health Related Facility	32.38 33.54	985.00	A,B,C
Seagirt Health Related Facility	31.58 32.71	961.00	
Woodhull Care Center	32.16 33.32	978.00	A,B,C
Margaret Tietz Center	35.08 36.87	1067.00	G
	35.64	1084.00 9/1/76	G
Ocean Promenade	28.43 - 29.53	865.00 5/3/76	B

A Prescription Drugs
Physical Therapy
Occupational Therapy
D Speech Therapy
E Physician Services
F Dental Services
G All Inclusive

HEALTH RELATED FACILITIES

Schedule of Rates

egion: New York City

Period: 1/1/76 - 12/31/76

County Name of Facility	Daily Rate	Monthly Rate	Services Included
Richmond County			
Carmel Richmond Nursing Home..................	$29.64 -29.59	$ 902.00	A,B,E,F
	28.72	874.00 2/1/76	A,B,E,F
Clove Lakes Health Related Facility........	30.03 31.11	913.00	B,C
Eger Lutheran Health Related Facility......	25.85 26.92	786.00	A,B,C,E,F
Golden Gate Health Related Facility.........	32.77 28.49	997.00	A,B,C,D
	32.80	998.00 4/1/76	A,B,C,D
	27.32	831.00 7/1/76	A,B,C,D,
New Brighton Manor H.R.F.....................	31.35 32.47	954.00	A,B,C

A- Prescription Drugs
B- Physical Therapy
C- Occupational Therapy
D- Speech Therapy
E- Physician Services
F- Dental Services
G- All Inclusive

PUBLIC HEALTH RELATED FACILITIES

1604

Schedule of Rates

Period: 1/1/75 - 12/31/75

Region: WESTERN NEW YORK County Name of Facility	Daily Rate	Monthly Rate
Cattaraugus County Home, Machias	18.66 $ 17.83	$ 542.00
Chautauqua County Home	1921 17.36	528.00
Erie County Home	20.43 19.55	595.00
Genesee County Home	26.18 24.10	733.00
	25.20	767.00 4/1/7
Orleans County Home	14.94 14.28	434.00
ROCHESTER REGION		
Livingston County H.R.F. (Mt. Morris)	26.44 25.20	767.00
Ontario County Home	25.21 24.00	730.00
Wayne County Home	28.71 27.33	831.00
CENTRAL NEW YORK REGION		
Willow Point H.R.F. (Broome Co.)	25.53 24.52	746.00
NYS Home for Veterans (Chenango Co.)	17.66 16.86	513.00
Onondaga County Home	19.99 14.60	444.00
NORTHEASTERN NEW YORK REGION		
bany County Home	25.26 24.05	732.00
Clinton County Home	23.45 22.38	681.00
Columbia County Home	16.58 15.83	481.00
Delaware County Home	24.36 23.32	709.00
Essex County Home	18.24 17.41	530.00
Fulton County Home	21.34 20.42	621.00
Otsego County Home	19.06 18.21	554.00
Rensselaer County Home	20.14 19.20	584.00
Saratoga County Home	23.44 22.35	680.00
Schenectady County Home	16.95 16.61	505.00
Washington County Home	16.23 15.56	473.00
NORTHERN METROPOLITAN REGION		
Orange County Home	16.85 16.08	489.00
Ulster County Home	20.30 19.38	589.00
Sullivan County Home	24.96 23.84	725.00
Westchester County Home	25.70 24.59	748.00
NEW YORK CITY REGION		
Neponsit Home	26.90 25.79	784.00

Schedule of Rates

1805

Region: Period: 1/1/76 - 12/31/76

County Name of Facility	Daily Rate	Monthly Rate
	$	$
NORTHEASTERN NEW YORK REGION (cont'd.)		
Saratoga County Infirmary	36.76 35.23	1072.00
Schenectady County Infirmary	33.82 33.75	1027.00
Warren County Infirmary	31.11 29.73	904.00
Washington County Infirmary	34.63 33.14	1003.00
NORTHERN METROPOLITAN REGION		
Dutchess County Infirmary	43.51 41.51	1263.00
Orange County Infirmary	45.71 43.77	1331.00
Rockland County Infirmary	37.30 35.77	1088.00
Ulster County Infirmary	35.56 34.09	1037.00
Westchester County Infirmary	45.78 43.84	1333.00
LONG ISLAND REGION		
Nassau County Infirmary	54.74 52.49	1597.00
Suffolk County Infirmary	44.95 43.06	1310.00

Schedule of Rates

1806

[illegible] Period: 1/1/75 -12/31/75

County Name of Facility	Daily Rate	Monthly Rate	
	$	$	
ESTERN NEW YORK REGION			
attaraugus County Infirmary,			
Machias	29.69 28.38	863.00	
Olean	39.14 37.68	1146.00	
hautauqua County Infirmary	30.17 26.60	809.00	
rie County Infirmary	46.56 44.48	1353.00	
enesee County Infirmary	39.03 35.82	1090.00	
	37.49	1140.00	4/1/7
iagara County Infirmary	33.56 32.01	974.00	
rleans County Infirmary	26.23 25.04	762.00	
ount View Health Facility	44.80 42.79	1302.00	1/1
enesee County Infirmary - Non-occupant day care service	11.37 10.14		
	10.86		4/1
ount View Health Facility - Non-occupant day care service	13.02 12.41		2/1
ROCHESTER REGION			
Chemung County Health Center	36.50 34.89	1061.00	
Livingston County Infirmary	33.87 32.32	983.00	
tario County Infirmary	28.91 27.57	839.00	
[illegible]ben County Infirmary	30.85 29.58	900.00	
Wayne County Infirmary	37.75 36.05	1097.00	
CENTRAL NEW YORK REGION			
Andrew Michaud Nursing Home (Oswego Co.)	35.07 33.54	1020.00	
Broadacres (Oneida Co.)	38.78 37.02	1126.00	
Broome County Infirmary (Willow Point N.H.)	38.78 37.18	1131.00	
Chenango Bridge Nursing Home	34.12 32.61	992.00	
Madison County Infirmary	26.78 25.55	777.00	
New York State Home for Veterans (Chenango Co.)	29.72 28.39	864.00	
Onondaga County Infirmary	45.78 39.95	1215.00	
NORTHEASTERN NEW YORK REGION			
Albany County Infirmary	49.61 47.46	1444.00	
Delaware County Infirmary	30.64 29.31	892.00	
Essex County Infirmary	32.84 31.40	955.00	
Franklin County Infirmary	28.39 27.21	828.00	
Fulton County Infirmary	30.30 28.98	881.00	
Montgomery County Infirmary	36.95 35.40	1077.00	
Otsego County Infirmary	29.30 28.02	852.00	
ensselaer County Infirmary	32.05 30.58	930.00	

Plaintiff's Exhibit 16

SCHEDULE OF RATES
SKILLED NURSING FACILITIES - NON PROFIT

COUNTY	NAME OF INSTITUTION	NEW RATE	OLD RATE	DIFFERENCE	1/1/77 RATE
Chautauqua	Lakeshore Nursing Home	34.06	36.39	2.33	35.64
Chautauqua	Lutheran Retirement Home	33.61	39.24	5.63	34.92
Erie	Brothers of Mercy Nursing Home	40.46	42.79	2.33	41.51
Erie	Downtown Nursing Home	38.30	40.24	1.94	41.52
Erie	Jennie B. Richmond Chaffee Nursing Home	37.60	46.35	8.75	37.53
Erie	Nazareth Nursing Home	35.90	36.18	.28	37.52
Erie	Niagara Frontier Nursing Home	39.77	40.01	.24	41.39
Erie	Rosa Coplon Jewish Home & Infirmary	42.63	48.80	6.17	44.40
Erie	Rhode Island Street Nursing Home Co.	36.36	42.73	6.37	37.73
Erie	Wheel Chair Home	26.41	28.87	2.46	27.61
Genesee	St. Luke's Manor	27.21	31.10	3.89	28.47
Niagara	Newfane Health Facility	30.74	35.87	5.13	36.15
Niagara	Niagara Falls Memorial Nursing Home	48.11	48.98	.87	49.93
Monroe	Goodman Gardens Nursing Home	38.13	38.86	.73	39.61
Monroe	Jewish Home and Infirmary	37.08	39.94	2.86	38.83
Monroe	Park Ridge Nursing Home	42.80	47.08	4.28	49.27
Monroe	St. Ann's Home for the Aged	36.38	42.60	6.22	38.08
Ontario	Geneva General Hospital Nursing Home	40.40	44.31	3.91	41.87

SCHEDULE OF RATES
SKILLED NURSING FACILITIES - NON PROFIT

COUNTY	NAME OF INSTITUTION	NEW RATE	OLD RATE	DIFFERENCE	1/1/77 RATE
Ontario	Thompson Nursing Home	38.57	47.35	8.78	45.32
Yates	Penn Yan Nursing Home	35.00	36.15	1.15	36.35
Cayuga	Mercy Health & Rehabilitation Center	40.45	44.46	4.01	38.23
Chenango	Chase Memorial Nursing Home	31.16	31.37	.21	32.45
Herkimer	Mohawk Valley Nursing Home	28.96	49.32	20.36	44.62
Jefferson	Samaritan-Keep Nursing Home	37.89	45.55	7.66	38.24
Oneida	Charles T. Sitrin Home	37.34	40.30	2.96	38.80
Oneida	Eastern Star Home & Infirmary	30.10	32.84	2.74	31.42
Oneida	Martin Luther Nursing Home	34.36	39.32	4.96	35.70
Oneida	Presbyterian Home of Central New York	32.54	36.52	3.98	35.49
Oneida	St. Joseph's Nursing Home Co. of Utica	38.95	40.96	2.01	40.58
Onondaga	Loretto Geriatric Center	42.30	53.00	10.70	50.10
Onondaga	Plaza Nursing Home	43.42	49.52	6.10	45.07
Onondaga	St. Camillus Nursing Home	37.21	41.28	4.07	38.82
Tioga	Tioga Nursing Home	37.43	45.62	8.19	38.68
Tompkins	Grand Lodge IOOF Home & Orphanage	26.18	31.74	5.56	28.18
Tompkins	Reconstruction Home	29.85	35.21	5.36	31.20

SCHEDULE OF RATES
SKILLED NURSING FACILITIES - NON PROFIT

COUNTY	NAME OF INSTITUTION	NEW RATE	OLD RATE	DIFFERENCE	1/1/77 RATE
Albany	Child's Nursing Home	40.98	42.31	1.33	42.38
Albany	Daughters of Sarah Nursing Home	44.70	50.92	6.22	46.43
Columbia	Adventist Nursing Home	36.44	40.90	4.46	37.90
Essex	Uihlein Mercy Center	44.67	47.31	2.64	46.56
Fulton	Gloversville Nursing Home	43.30	47.04	3.74	49.63
Fulton	Wells Nursing Home	37.82	39.25	1.43	39.22
Washington	Fort Hudson Nursing Home	29.42	34.81	5.39	30.51
Dutchess	Northeastern Conference Nursing Home	38.96	40.40	1.44	40.59
Rockland	Tolstoy Foundation Nursing Home	44.19	48.70	4.51	45.63
Sullivan	Roscoe Community Nursing Home	39.24	45.25	6.01	40.76
Westchester	Home for Aged Blind	38.66	55.34	16.68	40.32
Westchester	Howe Avenue Nursing Home	55.60	57.51	1.91	55.09
Westchester	Nursing Home & Extended Care Facility of White Plains	37.48	38.19	.71	39.03
Westchester	St. Cabrini Nursing Home	55.00	62.51	7.51	57.29
Westchester	Shalom Nursing Home	47.24	49.27	2.03	48.95
Westchester	United Home for Aged Hebrews	43.58	47.69	4.11	45.48

SCHEDULE OF RATES
SKILLED NURSING FACILITIES - NON PROFIT

COUNTY	NAME OF INSTITUTION	NEW RATE	OLD RATE	DIFFERENCE	1/1/77 RATE
Westchester	United Nursing Home for Aged	50.26	56.97	6.71	51.96
Westchester	Wartburg Nursing Home	39.15	49.21	10.06	40.81
Nassau	Long Beach Memorial Nursing Home	47.95	59.64	11.69	62.48
Suffolk	St. Johnland Nursing Home	48.82	54.91	6.09	50.60
Bronx	Beth Abraham Hospital	59.47	66.00	6.53	61.93
Bronx	Daughters of Jacob Nursing Home	65.82	69.30	3.48	68.14
Bronx	Hebrew Home for the Aged	48.72	64.86	16.14	50.71
Bronx	Hebrew Hospital for Chronic Sick	44.77	49.60	4.83	46.63
Bronx	House of Holy Comforter	42.59	51.46	8.87	44.40
Bronx	Methodist Church Home for the Aged	40.20	43.63	3.43	41.96
Bronx	Morningside House Nursing Home	56.20	59.04	2.84	58.28
Bronx	Palisade Nursing Home	62.12	73.49	11.37	64.27
Bronx	St. Patrick's Home for Aged & Infirm	41.69	43.40	1.71	43.38
Bronx	United Odd Fellows & Rebekah Home	40.11	53.24	13.13	41.75
Bronx	W.K. Nursing Home	68.77	69.82	1.05	71.34
Bronx	West Road Nursing Home	66.52	69.82	3.30	70.90

SCHEDULE OF RATES
SKILLED NURSING FACILITIES - NON PROFIT

COUNTY	NAME OF INSTITUTION	NEW RATE	OLD RATE	DIFFERENCE	1/1/77 RATE
Bronx	Workmen's Circle Home & Infirmary	43.69	51.38	7.69	45.52
Kings	Baptist Home of Brooklyn	41.74	45.23	3.49	39.66
Kings	Brookdale Hospital Center Nursing Home	61.96	76.75	14.79	62.28
Kings	Brooklyn Methodist Church Home	33.70	42.48	8.78	35.18
Kings	Concord Nursing Home	48.48	57.56	9.08	49.91
Kings	Haym Salomon Home for the Aged	40.46	53.41	12.95	42.17
Kings	Holy Family Home	33.09	45.26	12.17	34.54
Kings	Lemberg Home & Geriatric Institute	40.77	48.54	7.77	42.48
Kings	M.J.G. Nursing Home	69.51	71.76	2.25	71.05
Kings	New York Congregational Home	36.86	44.79	7.93	38.01
Kings	Norwegian Christian Home & Health Center	45.79	46.89	1.10	45.87
Kings	Sephardic Home for Aged	47.51	60.18	12.67	50.59
Kings	Wartburg Nursing Home	52.47	56.90	4.43	54.32
New York	Home of the Sages of Israel	37.93	43.36	5.43	39.56
New York	Jewish Home and Hospital for Aged	62.00	62.69	.69	64.55
New York	Mary Manning Walsh Nursing Home	53.48	64.56	11.08	55.42

SCHEDULE OF RATES
SKILLED NURSING FACILITIES - NON PROFIT

COUNTY	NAME OF INSTITUTION	NEW RATE	OLD RATE	DIFFERENCE	1/1/77 RATE
Queens	Jamaica Hospital Nursing Home	60.64	67.13	6.49	63.62
Queens	Jewish Institute for Geriatric Care	71.13	73.06	1.93	73.28
Queens	Margaret Tietz Center for Nursing Care	51.38	71.26	19.88	53.20
Queens	Peninsula General Nursing Home	67.32	73.00	5.68	72.73
Queens	St. Mary's Hospital for Children	59.41	77.43	18.02	61.94
Richmond	Carmel Richmond Nursing Home	50.28	56.57	6.29	52.58
Richmond	Eger Nursing Home	63.05	63.55	.50	65.40

SCHEDULE OF RATES

HEALTH RELATED FACILITIES - NON PROFIT

COUNTY	NAME OF INSTITUTION	NEW RATE	OLD RATE	DIFFERENCE	1/1/77 RATE
Chautauqua	Presbyterian Homes of Western New York	23.86	27.47	3.61	24.75
Erie	Brothers of Mercy Nursing Home	26.47	28.45	1.98	27.41
Erie	Presbyterian Homes of Western New York	18.99	19.07	1.08	19.91
Erie	Rhode Island Street Nursing Home	27.27	30.30	3.03	28.22
Niagara	Newfane Health Related Facility	19.73	23.64	3.91	22.03
Monroe	Fairport Baptist Home	19.43	19.51	.08	20.23
Monroe	St. Ann's Nursing Home, (The Heritage)	21.84	28.43	6.59	22.60
Broome	Good Shepherd-Fairview Home	16.71	16.83	.12	17.42
Chenango	Chase Memorial Nursing Home	22.81	25.55	2.74	23.72
Jefferson	Samaritan-Keep Nursing Home	29.50	31.14	1.64	28.00
Oneida	Charles T. Sitrin Nursing Home	27.25	28.99	1.74	28.26
Oneida	H.R.F. of Rome (Bethany House)	24.48	26.32	1.84	25.44
Oneida	Martin Luther Nursing Home	24.79	27.31	2.52	25.71
Onondaga	Loretto Geriatric Center	27.14	36.00	8.86	32.73
Oswego	St. Luke's Nursing Home	24.21	26.82	2.61	25.11
Albany	Good Samaritan Nursing Home	25.72	26.95	1.23	26.68
Albany	Teresian House Nursing Home	27.61	36.28	6.15	3[illegible].24

SCHEDULE OF RATES
HEALTH RELATED FACILITIES - NON PROFIT

COUNTY	NAME OF INSTITUTION	NEW RATE	OLD RATE	DIFFERENCE	1/1/77 RATE
Columbia	Adventist Nursing Home	25.83	28.91	3.08	26.81
Dutchess	Ferncliff Nursing Home	33.12	34.41	1.29	34.33
Westchester	Bethel Methodist Home	18.63	20.10	1.47	19.41
Westchester	Home of the Aged Blind	25.17	31.32	6.15	26.26
Westchester	Providence Rest	25.68	30.19	4.51	27.01
Westchester	Seabury Memorial Home	17.33	19.69	2.36	Not Liste
Westchester	United Home for Aged Hebrews	21.55	27.61	6.06	22.50
Westchester	Wartburg Intermediate Care Facility	23.22	29.58	6.36	24.22
Nassau	Long Beach Memorial Nursing Home	28.46	36.44	7.98	40.26
Suffolk	Consolation Nursing Home	32.51	33.48	.97	33.61
Bronx	Daughters of Jacob Nursing Home	39.47	45.61	6.14	41.28
Bronx	Hebrew Home for the Aged	29.24	31.39	2.15	30.47
Bronx	Methodist Church Home	22.37	24.32	1.95	23.38
Bronx	Palisade Nursing Home Co.	39.55	41.40	1.85	40.80
Bronx	Providence Rest Home for the Aged	25.88	30.19	4.31	27.01
Bronx	St. Patrick's Home for the Aged	25.12	26.81	1.69	26.18

SCHEDULE OF RATES
HEALTH RELATED FACILITIES - NON PROFIT

COUNTY	NAME OF INSTITUTION	NEW RATE	OLD RATE	DIFFERENCE	1/1/77 RATE
Bronx	West Road Nursing Home	32.54	41.59	9.05	42.67
Kings	Concord Nursing Home	35.48	37.73	2.25	36.38
Kings	Haym Salomon Home for the Aged	25.59	27.46	1.87	26.70
Kings	Lemberg Home & Geriatric Institute	24.60	28.45	3.85	25.65
Kings	Menorah Home and Hospital for the Aged	24.35	28.29	3.94	25.41
Kings	Metropolitan Jewish Geriatric Center	25.43	27.83	2.40	25.36
Kings	Sephardic Home for the Aged	33.83	40.69	6.86	35.00
Kings	Wartburg Lutheran Home	22.17	23.38	1.21	23.13
New York	Bialystoker Home for the Aged	25.13	28.18	3.05	26.17
New York	Home of the Sages of Israel	24.35	26.32	1.97	25.38
New York	Jewish Home and Hospital for the Aged	30.32	33.19	2.87	31.60
New York	Mary Manning Walsh Home	37.73	41.83	4.10	39.05
Queens	Bezalel Nursing Home Co.	30.00	35.05	5.05	31.03
Queens	Chapin Home for the Aged	31.96	32.80	.84	33.23
Queens	Ozanam Hall of Queens Nursing Home	34.48	40.94	6.46	35.60
Queens	Margaret Tietz Center	35.08	41.42	6.34	36.87
Richmond	Carmel Richmond Nursing Home	28.72	38.74	10.02	29.59